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CONVEYANCER'S NOTEBOOK

Town and Country Planning.—Memoranda have now been issued by the Law Society, the Surveyor's Institute, the Auctioneer's Institute, the Federation of British Industries and the Association of British Chambers of Commerce expressing dissatisfaction with the working of the Town and Country Planning Act and suggesting amendment. The Memoranda of the Law Society, the Surveyor's Institute, and the Auctioneer's Institute have been printed in our contemporary Journal of Planning Law and are too lengthy for recapitulation here.

As perhaps might be expected, the memorandum of the Law Society is most conservative in its approach and does not suggest any radical alteration. Its intention is to suggest improvements in the writing of the Act on the ground common to all four of the memoranda that too great an impediment is put in the way of development by the system as it now operates.

One of the suggestions of the Law Society is from a purely legal point of view worthy of close attention. It is proposed that where other government departments are consulted by the Planning Authority before grant of a planning permission the representations of the departments concerned should be made available to the applicant so that he may know the case he has to meet. The memorandum refers to administrative inconvenience, but if this means disclosure of government plans we agree with the Law Society that the end justifies the inconvenience. This is subject to a reservation not mentioned in the memorandum, namely, where disclosure would be really prejudicial to the public interest, *e.g.*, as disclosing defence plans. Any reservation of this kind would need careful framing, because the official mind is apt to take the view that any disclosure

of government plans not made public is prejudicial to the public interest. In fact analysis of the problem shows the great complexity of any matter that involves " planning " .

Coupled with the last suggestion is a further one that a planning authority should be required on application to say whether a specified existing use is a valid one. We have ourselves made this suggestion before, and in our view it can be supported unreservedly. The advantage of such a provision from the point of view of conveyancers is too obvious to require elaboration. As might be expected, the Law Society also make suggestions with regard to appeals in planning matters, and in particular suggest that an appeal should lie to the Lands Tribunal on the assessment of development charge. The last indirectly raises a problem that must occupy more attention with the passing years. If and when the purpose of development charge is effected it will become a purely artificial matter to determine enhanced value of land due to development. This becomes apparent whenever consideration is given to the advanced values of developed land. This enhanced value does not, of course, reflect merely the value of the land but also of the development on the land due, in part at least, to increased building costs, but due to other factors as well. Unless some central control is exercised over assessments of development charge manifestly not only injustice but unsatisfactory development will result.

But it is apparent that the main burden of concern lies with the nature and existence of development charge and " development value ". In our view this problem has been obscured to some extent by the form adopted by the Act. According to the Ministers introducing the Bill it was to effect a " revolution in land tenure ". Since it has become an Act most lawyers who have published their views on it have been concerned to show that it did nothing of the sort. It has been pointed out with some force and substance that there is nothing in the Act which specifically provides for any revolutionary effect upon land holding as such. The requisite of planning permission is certainly not new, though sometimes the importance of the earlier Acts has been disregarded, and the suggestion, rashly put forward by one writer, at least, that the development rights were now vested in the Crown, could not be supported by any provision in the Act. This is true and, furthermore, it was claimed against complaints of the insufficiency of the " global sum " that " development rights " did not exist as legal rights, and it is not, therefore, surprising that the straightforward vesting of such rights in the Crown, as was followed in the Coal Act, 1938, in respect of coal, was not adopted. Nevertheless, one result

has been to regard the development charge as a " tax " on development. This, of course, was not the intention, as the background to this legislation sufficiently makes clear. It is immaterial to the developer whether the money goes into the pocket of the landowner or the coffers of the State. The theory is that the community cannot afford to pay landowners to allow their land to be developed, and this includes landowners who develop their own land. In other words the development charge was regarded no more as a " tax " than the enhanced price paid to private landowners was regarded as a " tax ". In our view the use of the word " tax ", however loosely employed, introduces a wrong psycholgical approach to an inherently difficult problem.

The Auctioneer's Institute approach the question radically. They would abolish development charge, repay it when it has been collected and abolish the " global sum " as a corollary. It is also suggested that no compensation should be payable in respect of planning restrictions until the land ceases to be capable of reasonably beneficial use by the owner. The technique is to relieve local authorities of the additional cost to them of compulsory acquisition above existing use value, though this is a tentative proposal, and, of course, merely shifts the burden from one group of taxpayers to the taxpayer at large.

The Association of the Chambers of Commerce, having set out alternative proposals, come substantially to the same conclusion for abolition of development charge and the claims for development value. They give reasoned support to their conclusions of some interest.

The Surveyor's Institute do not appear to recommend putting back the clock quite so far, but have an intermediate proposal to the effect that the global sum should not be distributed, but the value ascertained and a certificate granted which could be assigned with the land, but that subject to that the market would be free. The payment would only be made on development, compulsory acquisition or refusal of planning permission. The corollary, of course, is a method of assessing development charge which is too complicated to detail here. The Law Society like the provisions for deferred payments of development value, but only specifically recommends a variation in the rate of development charge.

The Federation of British Industries recommend the solution of the Surveyor's Institute with some carefully considered proposals to avoid some of the obvious difficulties such as the possibility of a flood of applications for permission to develop in order to cash in on the certificate of value, if refused. It also recommends that the limit of £300,000,000 could be removed if deferred

certificates were used and that omissions to claim within the prescribed time could be made good. Assuming the validity of the proposals these supplementary recommendations seem wholly fair. No one with experience of the working of the Act can fail to be aware of the likelihood of injustice under the present system.

In the face of such a weight of authority it would be difficult to say that the present position gives us the best of all possible worlds. The suggestion that development charge is treated as " revenue " is alone a horrifying suggestion to the economic mind, since it is obviously a capital value. Nevertheless, we suspect that, with perhaps the exception of the Law Society, these nostalgic recommendations overlook the fact that the history of planning law is that half planning is no planning. We admit to a hearty dislike of planning. If we are to become nostalgic we look back with regret on the eighteenth century view that government is a bad thing and should be reduced to a minimum. Nevertheless, we suspect the nature of planning to be such that half measures are abortive. It is difficult to justify the implied suggestion that a landowner should get not only the price of certificate of development value but anything else, irrespective of existing use value, as well. The proposal of deferred "" development value " payments in itself seems good, but assuming an " existing use value " basis at all the general practice must remain probably with the extension of compulsory powers of acquisition in the case of the laggard landowner who will neither develop nor allow others to develop except at his price.

If we may say so the proposals of the Auctioneer's Institute must appeal to the specialist in land values. He will know when to buy and when to sell, because planning undoubtedly assists the property dealer to make money; the effect of planning must be artificially to appreciate or depreciate values in a way that only the expert can be expected to understand. Many would think that the opportunities afforded to property dealers by planning affecting developed land would afford him sufficient scope. The question that the Ministry will have to face in deciding upon this attractive proposal is whether the community can afford it, because after all the property dealer is ultimately paid by the community. Of course as conveyancers we would welcome its introduction, since the conveyancing problems of the planning Acts are greatly enhanced by the possibility of development charge and not lessened by the existence of development value.

These random jottings are designed primarily to call attention to these memoranda, some of which are very long, but all of which deserve close attention. It has been impossible to deal with a

tithe of the recommendations and we can only hope that in seeking brevity we have not misrepresented any that we have dealt with. We could have wished that the Law Society had made suggestions for some other recommendations for amendment on minor matters, including a new definition of "land", that might have eased the problems of conveyancers. The Act was not a conveyancing Act and would have been improved if this aspect of it had received direct attention.

Nevertheless, in conclusion, we would observe that if this widespread dissatisfaction represents the extent of the failure of the Act there is a probability of more drastic legislation. Attention may well be directed to the proposals of a new leasehold reform bill coupled with the provisions of the New Towns Act. It is not always remembered that there will be no freeholders in the new towns when they are developed.

Candlesticks on altar—legal ornaments.—An interesting decision of the Dean of Arches (Sir Philip Baker-Wilbraham) reversing the judgment of the Chancellor of Chelmsford Diocese (Linton Thorpe, K.C.) deals with the question of candlesticks on the altar. The case arose out of an application for a Faculty (*inter alia*) to replace six candlesticks on the altar of a church which had been partly destroyed by fire. The Dean of Arches in a written judgment examined in detail the authorities upon the question of having lights upon the altar and he pointed out that not all the decisions were consistent. He said (at p. 815): "Although the use of two altar lights must be regarded as the traditional and recognised use in the Church of England, I cannot hold that the use of more than two is necessarily illegal", but he goes on to say in a later paragraph: "I should be sorry if this decision were construed as encouraging the use of more than two lights on or behind the Holy Table. . . . All that my decision involves is that it is within the discretion of a diocesan chancellor, in any proper case, to allow more than two, but this is a discretion which ought to be exercised with great care".

The case is of interest on several points but most because it illustrates a peculiarity of English ecclesiastical law. As the learned Dean of Arches pointed out (at p. 814), before the decision in *Read* v. *Bishop of Lincoln*, [1892] A. C. 644, it seems to have been *established* law that the use of candles, otherwise than for the purpose of giving light, was illegal. Since that case, although it was far from conclusive, it has been the custom to assume that there was and is a traditional usage of two candles. Now the

position is an extension which had already been made in one or two cases, but it should be said that it was claimed that there was no "ceremonial use" involved, but merely a claim to greater dignity in the service. But what is of interest to the lawyer is the willingness to change "established law". It is not our purpose to criticise but to call attention to a point which we think can be illustrated by other recent decisions on illegal ornaments.

Statutory Instruments.—We have received the following communication from H.M. Stationery Office :—

Statutory Instruments Fixing the Date of Commencement of Acts of Parliament

Certain Acts of Parliament are brought into force by means of a Statutory Instrument which sets forth the date from which an Act already passed by Parliament shall operate. Hitherto such Instruments have been listed in common with other Statutory Instruments in the daily list issued by this department but special attention has not been drawn to them. In future such orders will have the letter "C" inserted following the registration number thus SI 1951, No. 517 (Cxx), and they will appear separately at the head of the Statutory Instrument list under the following heading :—

Statutory Instrument Issue List

Commencement Orders (bringing an Act or part of an Act into operation)

The object of this change of procedure is to bring these instruments to the notice of the interested public.

It should be noted that, owing to the "Commencement" classification having been introduced late in the year 1950, when several Commencement Orders, had already been published, it has been decided, in order to avoid confusion, to commence serial numbering in the C series with the first Commencement Order for the year 1951. Meanwhile, however, the letter C will be printed in brackets following the Statutory Instrument number.

Richard Preston, A Centenary

Richard Preston, the eminent conveyancer, died on June 20, 1850. Few legal authors have rivalled the immense output of this giant of the last century, whose works are a testimony to the

exactitude of our legal science and to the pre-eminent role which the law of real property has played in it. In a preface to his work on Estates, Preston justified the volume and depth of his writing by referring to the natural belief in property of a "free and commercial people". The fine distinctions and arbitrary rules of the old land law would find few champions today, but it is undeniable that they bred a generation of subtle and profound lawyers, whom we may well match with the famous jurists of Europe. It is as an example of legal scholarship that Preston should be remembered even more than for the substance of his work.

This does not mean that his works have lost all value for the modern conveyancer. In many cases they have formed the channel through which our knowledge of the law of real property has passed, even if this knowledge has reached us more immediately through a modern treatise or a modern decision. In some cases it is still necessary to cite Preston's work as an authority for some fundamental principle, as Professor Cheshire does in dealing with the nature of the fee simple and the entailed interest (*Modern Real Property*, 6th ed. (1949), 102, 334, 341, 342). Most important of all, it is works like his which formed the dictionary of the Parliamentary draftsmen and which bring to life the dry phrases of their enactments.

Preston has also shared the distinction of being ranked with Sugden and Fearne as an authority to be cited in court. Conveyancing treatises of the last century enjoyed particular weight. Professor C. K. Allen has explained (*Law in the Making*, 4th ed. (1946), 240): "Much of real property law *is* conveyancing and nothing else. It is not surprising, therefore, that the courts have consistently heeded weighty expositions of the practice of conveyancers coming from extra-judicial sources, and have not hesitated to treat them, in fact if not in name, as 'authority'". A note by Preston was cited in the case of *Re Hollis' Hospital*, [1899] 2 Ch. 540, and there must be many other references in unreported cases.

It would be impertinent to judge his work at this date when so much of it has been overhauled by time and change. It was considered next only to Sugden's in quality. The chief adverse criticism was that he often made statements in the grand manner without troubling to give authorities, "he is too frequently satisfied in leaving a somewhat questionable opinion to be supported only by his own authority" (*Legal Observer*, Vol. IV, No. LXXXI. Saturday, May 5, 1832).

Preston's career is extremely interesting. He was a Devon man, born at Okehampton and dying at Chulmleigh. As a young

man he was a solicitor and no doubt formed at this period his affinity for his subject. At the age of twenty-one he published a small volume on Estates which many of his admirers preferred to the more solid writings of his later years. In 1797 he moved from Exeter to London. He decided to become a barrister and was called to the Bar of the Inner Temple on May 20, 1807. He must have been active professionally as he referred in 1820 to thirty-five years extensive practice in the law, which would date his legal career as commencing at the age of seventeen, possibly as an articled clerk. In 1834 Preston became a Bencher of his Inn and took silk. In 1844 he became a Reader of the Inn. From 1812 to 1818 he was M.P. for Ashburton and was known as extremely conservative in politics. His political activities do not seem to have interfered with his legal career. In June, 1835, he was appointed to the chair of Law at King's College, London, but the University attracted few law students at that time, as the Inns of Court and Law Society held aloof from it. In December, 1838, Preston resigned as he had been unable to form a large enough lecture class. His work as Professor at King's College and as a Reader at the Inner Temple does not exhaust his teaching experience. He must have had numerous students elsewhere, possibly as a lecturer at the Inns of Court. His works on Abstracts and on Conveyancing were originally delivered as lengthy courses of lectures to pupils in the general period 1815 to 1830. A modern lecturer would hardly dare to deliver such voluminous lectures or give such protracted courses. On Abstracts alone he lectured for 100 one hour periods ! Such facts give one pause when one hears that conveyancing is hardly an academic subject or one that lends itself to systematic teaching.

As Preston's works appeared at almost the same time it is difficult to deal with them chronologically and they may perhaps most conveniently be referred to in alphabetical order.

Preston's essay on *Abstract of Title* (2nd ed.), 1818. Royal 8vo. 3 volumes. Vol. 1 consists of 451 pp. and deals with formal matters, with the root of title and with capacity. Vol. 2 is of 456 pp. and deals with leases, future interests and trust estates, and seisin. Vol. 3 has 406 pp. and deals with the habendum, surrenders and fines. Pp. 205–406 deal with advising on title (" summing up the title "). The title of Essay is hardly the most appropriate for this massive work. The criticisms of its arrangement seem justified but for the practitioner this becomes simply a matter of familiarity rather than principle.

Preston's treatise on *Conveyancing* (3rd ed.), 3 volumes. In these scrambling and unquiet times it is the most modest and

summary book which often becomes the most popular. In the halcyon days of the land law an author had difficulty in keeping within sight of the end of his work. The treatise on conveyancing was a project only fragments of which were completed. Vol. 1 (1819) devoted 514 pp. to Fines and Recoveries. The unrepentant author continued with this subject in the second volume, published in 1825, adding material on the Lease and Release, with a total length of 531 pp. The third volume, published in 1829, consists of 580 pp. entirely concerned with the law of merger. The changes brought about by the Judicature Acts have reduced this doctrine today to more manageable proportions, since the equitable rules are so much simpler. Even Preston confessed that it had grown to three times the size which he originally intended. He planned to devote the fourth volume to Surrenders. In 1832 the writer in the *Legal Observer*, already referred to, doubted whether any such volume would appear and, in fact, Preston died without adding a fourth volume.

Preston's treatise on *Estates*, 2 volumes. Vol. 1 was published in 1821 and deals with estates in possession and expectancy, with conditions, with freeholds and the rule in Shelley's case, about which Preston had formerly written a tract. Vol. 2 was published in 1827 and deals with the limitation of the fee simple by deed and will, with conditional fees, with the limitation of the entail and with disentailment. Owing to its fundamental character this work will probably remain of value longer than any other of Preston's books. It totals 1066 pp.

Preston's edition of *Sheppard's Touchstone* (7th ed.) Vol. 1 appeared in 1820, and Vol. 2 in 1821, with a total of only 529 pp. The first volume deals with deeds and with fines, with important chapters on the interpretation (or "exposition") of deeds. The second volume deals with sales and leases, feoffments, surrenders, confirmations, releases, wills and obligations.

No better conclusion could be made to this note than a text of Preston's (*Conveyancing*, Vol. 1, p. ix): "The misfortune of a person, who, either as a clerk to a solicitor or as a student in a conveyancer's chambers, begins to study the practice of conveyancing, is, that he is taught by form, or precedent, rather than principle. He is made to copy precedents, without knowing either their application, or those rules on which they are grounded. When he begins to prepare drafts, he is led to expect all his information from these forms; and his knowledge is, in the end, as limited as the means by which he has been instructed".

A. K. R. K.

"LAND" WITHOUT EARTH: FREEHOLD FLATS IN ENGLISH LAW

By S. M. Tolson, LL.B., Barrister-at-Law

We begin with a paradox. Does English law recognise a freehold interest in land in part of a structure which is not in direct contact with the ground? This question has been settled affirmatively in the land law of most countries of the world with very satisfactory results. In Germany, Austria and Switzerland, such tenure is not permitted, and in Germany at least this is found to be a great disadvantage. This is a subject of much more importance in a country where English Common Law does not prevail, because there a tenant usually has no right to assign his interest apart from making a novation.

Here in England, the presence of our law of landlord and tenant has diverted attention from the possibility of creating such an interest, but it never seems to have been doubted that it can exist. *Coke on Littleton* (4a) says, "land legally includeth all castles houses and other buildings" (and "land builded is more worthy than other land, because it is for the habitation of man"!). The Conveyancing Act, 1881, defines land as "land of any tenure, tenements and hereditaments, corporeal or incorporeal, houses and other buildings . . ." (section 2 (1)). Since 1851 unless there is a contrary intention, the expression "land" in any Act of Parliament, includes houses and buildings of any tenure (Interpretation Act, 1889). Finally, the Law of Property Act, 1925, s. 205 (IX) enacted the matter specifically, "land includes . . . buildings or parts of buildings (*whether the division is horizontal or vertical* or made in any other way)" which if granted for an estate in fee simple absolute in possession may subsist, be created or conveyed at law (section 1 (1), Law of Property Act, 1925). There are some, though not many, buildings in England which are owned in this fashion; one of them is part of one of the Inns of Court.

The Right of Support

When a vendor sells the freehold of a floor of a building, the first inquiry which must be made is whether the floor is supported by a natural right or by an easement. In *Bonomi* v. *Backhouse*, 1 E. B. & E. 622, at p. 654, Willes, J., said, "The right to the

support of land and support of buildings stand upon different footings as to the mode of acquiring them, the former being *prima facie* a right of property analogous to the flow of a natural river or of air . . . whilst the latter must be founded on prescription or grant express or implied : but the character of the rights when acquired is in each case the same". Again in *Dalton* v. *Angus*, 6 App. Cas. 740, Lord Selborne said, at p. 792, "Support to that which is artificially imposed on the land cannot exist *ex iure naturæ*, because the thing supported does not itself so exist. It must in each case be acquired by grant, or by some means equivalent in law to grant . . . in order to make it a burden. . . . If at the time of the severance of the land from that of the adjoining proprietor, it was not in its original state but had buildings on it up to the dividing line then there would be an implied grant of such support, as the state of the land would require, and the artificial would be inseparable from and (as between the parties to the contract) would be a mere enlargement of the natural. If the building is divided into floors or flats separately owned (an illustration which occurs in many of the authorities) the owner of the upper floor or flat is entitled on the same principle, to vertical support from the lower part of the building, and to the benefit of such lateral support as may be of right enjoyed by the building itself". It appears then that the right of support is an easement (*Lemaitre* v. *Davis* (1881), 19 Ch. D. 281, at p. 291) which must lie in grant express or implied, or be acquired by prescription.

Rights Conveyed and Retained by Implication

When a freehold of this type is created, on the sale of part of a house, in the absence of agreement, the ordinary law as regards implied grants and reservations will of course apply. A purchaser will acquire all that passes under the general words implied by section 62 of the Law of Property Act, 1925 (though if the conveyance has not been executed, then only such quasi-easements will pass as are continuous, apparent and reasonably necessary within the Rule in *Wheeldon* v. *Burrows* (*Borman* v. *Griffiths*, [1930] 1 Ch. 493)). Thus in any case, unless it is expressly excepted from the grant, a purchaser will receive a right of support, and probably also a right of way over the stairs if he buys an upper floor.

The vendor will impliedly reserve and regrant to himself on sale only such easements of necessity as are essential to any use of the property, and not those which are merely necessary to the

reasonable enjoyment of it. (*Union Lighterage Co.* v. *London Graving Dock*, [1902] 2 Ch. 557.) Rights which pass are :—

Firstly, a right of way where the property is landlocked (as would pass here if the upper floor were retained), but only as it was used at the time of the grant. (*Maguire* v. *Brown*, [1921] 1 Ir. R. 148; *London Corporation* v. *Riggs*, 13 Ch. D. 798);

Secondly, rights necessary for the enjoyment of the property retained where the use is to be changed and that fact has been communicated to the purchaser (*Cory* v. *Davies*, [1923] 2 Ch. 95), or where it is commonsense to imply an intention at the time of the grant that an easement should be reserved. (See *Re Webb* (1950), 2 All E. R. 828; *Simpson* v. *Weber*, 133 L. T. 47; *Pwllbach Colliery* v. *Woodman*, [1915] A. C. 634, *per* Lord Parker at p. 646; *Jones* v. *Pritchard*, [1908] 1 Ch. 630.)

Thirdly, it seems obvious, that by analogy to what Pollock, C.B., said in *Richards* v. *Rose* (1853), 9 Exch. 218, at p. 221, that a right of support will be impliedly reserved. "It seems clear that, where a number of houses are built upon a plot of ground, all the houses belonging to the same person, being all built together, and each obviously requiring the mutual support of its neighbours for their common support and security, such right of mutual support equally exists, whether the owner parts first with one house, and then with another, or with two together, the ownership of the latter being afterwards divided. . . . The right does not depend upon the determination of the fact whether the houses are parted with at one or at separate times. That fact cannot affect the result where the houses are originally built, depending upon each other, and requiring their mutual support. . . . It seems purely a matter of common sense."

Lastly, a right of drainage will also be reserved. (*Wheeldon* v. *Burrows* (1879), 12 Ch. D. 31, *per* Thesiger, L.J., at p. 59.)

Where two properties are sold contemporaneously and each purchaser has notice of the sale to the other, all continuous and apparent easements are acquired by both purchasers as if each had bought first. (*Aldridge* v. *Wright*, [1929] 2 K. B. 117, at p. 130, *per* Greer, L.J.)

Where there is a party wall or structure, section 38 of the Law of Property Act, 1925, will apply, and the wall or structure will be deemed severed vertically (and presumably horizontally in the case of floors and ceilings) between the respective owners of each part, the owners of each part having such rights of support and user over the other part as are necessary.

To sum up : As in the case of a sale of an ordinary freehold, the purchaser is in a good position, the vendor, however, should

protect himself by reserving all rights which are necessary, especially rights of way (*Aldridge* v. *Wright*, *supra*) and light (*Ray* v. *Haseldine*, [1904] 2 Ch. 17).

Repairs

The main problem which results from the sale freehold of one floor only of a house, is how to ensure that the property shall be kept in repair. This difficulty arises for the following reasons. *Firstly*, while a servient owner who demolishes a building subject to a right of support must supply other support to the dominant tenement (*Bond* v. *Nottingham Corporation*, [1940] 1 Ch. 429), yet, there is no duty at all on him merely to repair the servient tenement. (See *Jones* v. *Pritchard*, [1908] 1 Ch. at p. 637, *per* Parker, J., and *Sack* v. *Jones*, [1925] Ch. 235.) Thus a ground floor owner may allow upper freehold floors to become uninhabitable without liability to himself, where he allows his part of the structure to collapse. *Secondly*, if a covenant for repair is inserted in a conveyance, although the benefit will clearly run (*Smith* v. *Douglas Catchment Board*, [1949] 2 All E. R. 179), the burden of it, or of any other positive covenant does not run with the land at Common Law. (*Austerberry* v. *Corporation of Oldham* (1885), 29 Ch. D. 750; *E. & G. C., Ltd.* v. *Bate* (1935), L. J. (News.) 203; *Cator* v. *Newton*, [1940] 1 K. B. 415) though the burden of a negative covenant runs in Equity against all save a *bona fide* purchaser for value without notice (*Re Nisbett and Pott's Contract*, [1905] 1 Ch. 391); and registration as a land charge operates as notice : Law of Property Act, 1925, s. 198.

It is hardly necessary to say that the ordinary law of restrictive covenants in general and that of building schemes in particular, will apply to freehold flats and offices, just as much as to any other type of freehold, and nothing need be said on these subjects. However, a method of securing repairs against assignees other than by express covenants in each conveyance, is imperative before a freehold flat becomes a desirable possibility. There are really two sets of facts to which different considerations apply. Firstly, where a large block of flats or offices is built with a view to selling them off freehold, and secondly, where an owner divides his house horizontally and sells one of the floors. The two cases which the writer has investigated were of the former kind. One is subject to a private Act of Parliament, whereby the owner of each freehold is bound to pay for repairs, etc., sanctioned by a right to distrain for arrears of payment vested in a committee of owners. In the other case, the land on which the building stands is vested in trustees, and each incoming free-

holder enters into personal covenants with them. (The means of enforcing the making of such personal covenants was not disclosed, presumably it was by the insertion of an absolute right of re-entry (see below) vested in the trustees.) This latter method has proved a satisfactory answer to the difficulty for a hundred and fifty years.

RIGHTS OF ENTRY AND RE-ENTRY

The appointment of trustees and all this would entail, seems rather an involved course of action to take when dividing a moderate sized house into two or three flats. In such a case, the difficulty might partly be solved by inserting an absolute right of re-entry on failure to perform stipulations contained in covenants in the conveyance, operating to give the purchaser an estate upon condition. An absolute right of re-entry on to land must be distinguished from a simple right of entry. While the former is a vested interest in the land, a possibility of an estate, which may vest at some future time, the latter is probably a type of licence.

An ordinary licence is, of course, purely personal (*King* v. *David Allen & Son*, [1916] 2 A. C. 54), and it was decided in *Smith* v. *Colbourne*, [1914] 2 Ch. 533, that a simple right of entry was a revocable licence and did not give an adjoining owner any interest in the land, or if it did, was void for perpetuity. However, in *Ex p. Ralph* (1845), De Gex 219 (three years before *Tulk* v. *Moxhay*) not cited in *Smith's Case*, Knight-Bruce, V.-C., thought that the insertion of a simple right of entry was the best method of securing the "due observance and performance of" a restrictive covenant. He did not seem to doubt (as he did with regard to restrictive covenants) that such rights of entry could run with the land. Also section 162 (1) (d) (iii) of the Law of Property Act, 1925, seems to support the conclusion that such a right may be an equitable interest in land.

However, it is unnecessary to attempt a solution of these difficulties. An absolute right of re-entry clearly is an equitable interest in land (section 1 (2) (e) and (3), L. P. A., 1925) and does not prevent the fee simple subsisting as a legal estate. (Section 7 (1), L. P. A., 1925.) Also, the creation of a right of re-entry probably does not make the land settled land, though this is not clear. (See *Hood & Challis's Property Acts*, p. 83; cf. *Re Austen*, [1929] 2 Ch. 155.)

Although the Law of Property Act, 1925, has caused great confusion by failing frequently to distinguish between simple and absolute rights of re-entry, it seems clear that the benefit of a

right of re-entry must run with the land for the benefit of which it is granted. By section 56 (1) of the Law of Property Act, 1925, a person may take an "immediate or other interest in land . . . or the benefit of any condition" or "right of entry . . . although he may not be named as a party to the conveyance or other instrument". Also by section 4 (3) of the Law of Property Act, 1925, "all rights of entry affecting a legal estate which are exercisable on condition broken or for any other reason may after the commencement of the Act be made exercisable by any person or the persons deriving title under him . . . " . (See *Hood & Challis's Property Acts* at p. 82.)

As the right is an equitable interest, assignees of the burden of the right must have notice of it in order that it may be enforced against them, and it will therefore require registration under the Land Charges Act, 1925, s. 10. (Class D.3 presumably.) The main disadvantage attached to the right of re-entry is that it is clearly subject to the perpetuity rule (section 4 (3), L. P. A., referred to above) and therefore it will cease to have effect in a comparatively short time.

The form in which the right of re-entry may be used in practice has been embodied in the accompanying precedent. [See p. 456.] It is limited to take effect within the period permitted by *Re Villar*, [1928] Ch. 471, and can be exercised by the owner for the time being of one floor, when the owner for the time being of the other floor fails to keep the stipulations contained in the covenants to the conveyance. It seems necessary to annexe the rights to the corresponding freeholds as they can probably exist in gross. (See *Doe d. Freeman* v. *Bateman* (1818), 2 B. & Ald. 168, *per* Abbott, C.J., at p. 170.)

It is not thought advisable to frame the right to take effect on breach of covenant simply as an assignee will not be bound by a positive covenant, and therefore probably cannot break it.

Rights of Entry and Re-entry Annexed to Rentcharges

It will be noticed that section 1 (2) (e) of the Law of Property Act, 1925, makes a right of entry (which must include both re-entry and simple entry) "*annexed for any purpose to a legal rentcharge*", a legal interest. Also that section 4 (3), L. P. A., provides that all rights of entry "in regard to an estate in fee simple (not being a rentcharge held for a legal estate)" must be limited within the perpetuity period. This brings us to inquire whether the main defect of a right of re-entry for our present

purpose, namely the presence of the perpetuity rule, may be removed by annexing the right of re-entry to a rentcharge.

It seems clear that rights of entry annexed to rentcharges must run with the rentcharge, and without registration as they are legal interests, and again by virtue of section 56 and section 4 (3), L. P. A., 1925. It does not seem to matter whether the right is annexed for the non-payment of rent or for any other purposes as the Act specifically says "for any purpose". (See *Key & Elphinstone*, 14th ed., Vol. I, at p. 453, note (r), and *Prideaux*, 24th ed., Vol. I, precedent on pp. 730–731.) Nor does it seem to matter whether the right is simple or absolute, as the exercise of the absolute right will in any event be subject to statutory relief where the breach is repaired and compensation paid. (Section 146 (1) and (5), L. P. A., 1925.)

With regard to the application of the perpetuity rule, *Key & Elphinstone* notes (on p. 453, *supra*), that section 4 (3), L. P. A., 1925, is so obscure as to be unintelligible, but is made much clearer if "annexed to" is added to the words in parenthesis. This interpretation, *viz.*, that rights of entry annexed to rentcharges are free from the perpetuity rule, is supported by section 18 (2) of the Land Registration Act, 1925, where presumably the Legislature intended to create the same position, and provided that a power of re-entry attached to a rentcharge to take effect on default of payment or breach of covenant might be exercisable *at any time*.

However, *Williams on Vendor and Purchaser*, Vol. I, p. 694, is of the opinion that the exemption in section 4 (3) only extends to rights of entry for the benefit of the rent itself: *i.e.*, to enter and satisfy arrears of rent out of the profits. *Prideaux* (Vol. 1, at p. 731, note 63) is in favour of caution and suggests that the limitation allowed by the *Re Villar* rule should be added. It is submitted that the view of the learned editor of *Key & Elphinstone* is correct and that no rights of entry annexed to rentcharges are subject to the perpetuity rule. Therefore, in the accompanying precedent (at p. 453) for those who wish to adopt this course, simple rights of entry annexed to cross-rentcharges have been added in brackets. Again for the same reason as before, the rights are made exercisable on specified events, and not on breach of covenant. Notwithstanding that section 18 (2) of the Land Registration Act, 1925, might be interpretated to mean that the contrary is valid, it seems a precaution that can cause no harm. (See *Prideaux*, at p. 731, *supra*.)

It is submitted that by this means, the owner of one floor can always ensure that the other floor or floors are kept in repair by

the owner for the time being. It is, of course, possible to extinguish the rentcharges by statute under section 191 of the Law of Property Act, 1925, but it seems that any benefit to be gained by one owner doing this will be lost when reciprocal action is taken by the other owner or owners.

It must not be forgotten that this is a case where the statutory acknowledgment and undertaking will be necessary.

CUSTOM AND AGRICULTURAL TENANCIES

Second Report of the Committee on Agricultural Valuation

By J. Muir Watt, M.A., Barrister-at-Law

The Second Report of the Committee on Agricultural Valuation (H.M. Stationery Office, price 4d.), published in October, 1950, contains material of great interest for lawyers who are concerned with agricultural tenancies, as well as for land agents and agricultural valuers. The Committee, which consists of eminent tenant-right valuers under the chairmanship of the Director of the Agricultural Land Service, Mr. R. R. Ware, are advised on legal matters by the Ministry of Agriculture's legal staff, and their Reports are a unique blend of practical and legal knowledge. Their Second Report deals with three matters referred to them by the Minister:—

(i) The assessment of compensation for tenant-right matters other than those included in Part II of the Fourth Schedule to the Agriculture Act, 1947 [now reproduced in Part II of the Fourth Schedule to the Agricultural Holdings Act, 1948].

(ii) The desirability of introducing some uniformity in the present customary rights of holdover and pre-entry.

(iii) The desirability of reducing the existing number of customary term-days.

A short explanation of these three matters and of the Committee's conclusions thereon may be of assistance to readers who are called upon to advise agricultural landlords or tenants or to draft agricultural tenancy agreements.

Tenant-right matters not included in Part II of the Fourth Schedule to the Agricultural Holdings Act, 1948

Until the Agriculture Act, 1947, the tenant's right to compensation for what are known as tenant-right matters was governed in part by written agreements and in part (a large part) by custom. Although the various Agricultural Holdings Acts had constructed a statutory code of compensation for improvements, no such statutory provision had been made until 1947 for tenant-right matters, with the exception of claims in respect of laying down

pasture. Tenant-right matters, which bulk large upon a change of tenancy and in the valuation of which tenant-right valuers exercise a traditional and remarkable skill, comprise such things as growing or severed crops left behind by an outgoing tenant or seeds sown or acts of husbandry performed by him, the benefit of which will be reaped, not by him, but by his successor. As the agricultural year has no beginning or end, an outgoing tenant, at whatever season he quits, must, if he has acted in a husbandlike manner, leave behind him in different stages of growth and maturity a variety of the fruits of his toil. It is of great importance for agriculture that an outgoing tenant should continue up to the moment of his departure to carry out the cycle of agricultural operations with the same care as if he were going to remain to enjoy the results himself. It would be a serious discouragement to good husbandry if the incoming tenant were to reap where he had not sown without compensating the outgoer for his efforts.

Customary compensation for tenant-right matters grew up to protect the outgoing tenant from the hardship and injustice which the rigour of the common law would have inflicted on him by compelling him to leave behind him without compensation the full benefit of his tillage and husbandry. These customary rights to compensation varied throughout the country, not only between county and county but between district and district. They varied between the full Yorkshire custom of the "away-going crop", under which compensation was paid in Ladyday tenancies on the basis of the estimated probable value of the corn crop when harvested (an expensive matter) and the less costly "seeds and labour" basis found in the South. It was considered by Parliament in 1947 that the wide variety of customs relating to compensation for tenant-right matters was detrimental to the best interests of agriculture, not only because it led to a good deal of uncertainty in regard to the exact customary rights which existed in particular districts, but also because the heavy expense of some customary bases of valuation, *e.g.*, in the Ridings of Yorkshire, compelled an incoming tenant to lock up an undue amount of capital on entry, leaving him with insufficient for the efficient working of the farm.

The Agriculture Act, 1947, accordingly established for the first time a statutory basis of compensation for the *main* (not all) tenant-right matters. It at the same time abolished the customary rights to compensation for all tenant-right matters, with certain savings for sitting tenants. The extent of the savings for sitting tenants, which were by no means co-extensive with the range of the customary rights abolished, gave rise to difficulties which are dealt with below.

It is worth mentioning in passing that it was only the customary rights to *compensation* which were abolished. Customs not involving compensation, such as pre-entry and holdover, were not affected.

The statutory provision which abolishes customary compensation and prescribes the savings for sitting tenants (*i.e.*, tenants in occupation on March 1, 1948) is now section 64 of the Agricultural Holdings Act, 1948, re-enacting section 27 and section 34 (2) of the Agriculture Act, 1947. Section 64, the exact wording of which is important, reads as follows :—

> " A landlord or tenant of an agricultural holding shall not be entitled under custom to any compensation from his tenant or landlord for any improvement, whether or not one in respect of the carrying out of which compensation is provided under this Act, or any matter specified in Part II of the Fourth Schedule to this Act, or otherwise :
>
> Provided that this section shall not apply to compensation for an improvement of a kind specified in the Third Schedule or Part I of the Fourth Schedule begun before the first day of March, 1948, or, in a case where sub-section (1) of section 47 of this Act does not apply to the tenant as regards the matters specified in Part II of the said Fourth Schedule, to compensation for a matter so specified ".

It should be explained that the abolition of customary rights to compensation effected by the first paragraph of this section applied in cases where the tenant quitted the holding in consequence of a notice to quit given on or after March 1, 1948, not before. In what follows it is assumed that this condition is fulfilled.

The result of section 64 upon customary rights to compensation for tenant-right matters is twofold :—

(1) The main part of the section abolishes *all* such rights, whether they are of the kinds specified in Part II of the Fourth Schedule *or otherwise*. This means that customary rights to compensation are abolished not only in respect of the principal tenant-right matters which are henceforth embodied in the statutory code constituted by Part II of the Fourth Schedule, but in respect of any other tenant-right matters which might have been the subject of local compensation customs. Customary compensation for tenant-right is, in other words, abolished root and branch.

(2) The proviso to the section, however, establishes a saving for sitting tenants (*i.e.*, tenants in occupation on March 1, 1948) who have not elected that the statutory code of compensation contained in Part II of the Fourth Schedule

should apply to them. Such sitting tenants can continue to claim compensation on a customary basis in respect of tenant-right matters, provided that (and this is important) *they are matters of a kind specified in Part II of the Fourth Schedule.*

It will be observed that whereas the main part of section 64 abolishes all customary compensation for tenant-right matters, of whatsoever kind they might be, the proviso to the section only saves the rights of sitting tenants to customary compensation in respect of the main types of tenant-right matters specified in Part II of the Fourth Schedule. It does not save any customary rights which they may have previously enjoyed in respect of any other tenant-right matters. This is rather surprising, as one would expect that such sitting tenants (who have not elected for the statutory basis of compensation) would have had *all* their customary rights preserved to them. It is the more surprising since paragraph 41 of the Explanatory Memorandum on the Bill for the Agriculture Act, 1947, suggested in the following passage that the intention was that a sitting tenant who did not elect for the statutory basis should go out in all respects as he came in—in other words, that *all* his customary rights to compensation were to be preserved :—

> "A sitting tenant may, as regards tenant-right, elect to go out either on the basis of the compensation laid down under the Bill or on the basis of either custom or the contract of tenancy under which he entered the holding".

In cases where the basis of compensation for tenant-right is laid down in a written contract of tenancy no difficulty arises. In such cases a sitting tenant who did not elect for the statutory basis can continue to rely upon the terms of his written contract. Where, however, the sitting tenant had been entitled only under custom, and his rights were not embodied in a written agreement, it would appear from the restricted nature of the saving contained in the proviso to section 64 that he might have irretrievably lost the benefit of some customary rights. If he had had a customary right to compensation for a tenant-right matter of a kind not specified in Part II of the Fourth Schedule, such a right is abolished by section 64 and is not saved by the proviso. Since he presumably paid for such tenant-right matter in his ingoing valuation it would seem rather hard that he is deprived of it without compensation. This is certainly a theoretical defect in the Act, but it is only of practical importance if there are in fact any tenant-right matters of a substantial nature which are not covered by Part II of the Fourth Schedule.

The Committee on Agricultural Valuation have decided (and no

group of men have greater knowledge or experience of the subject) that there is only one important tenant-right matter which falls within this category—the acclimatisation of hill sheep, or to give it the full appellation used by the Committee, "acclimatisation, hefting and settlement". For the benefit of the uninitiated it should be explained that a hill flock of sheep which is kept on the same ground develops a high degree of immunity from tick-borne diseases and also the habit of remaining within the limits of its proper fell grazing, although this is often unfenced. A flock so habituated or "acclimatised" is more valuable than a strange flock to the occupier of the holding, and this additional value is paid for on a change of tenancy at customary rates. Compensation for acclimatisation, hefting and settlement is, therefore, a species of customary compensation, of considerable importance in the North of England and Wales, as well as in Scotland. It is abolished, like other customary compensation, by s. 64 of the 1948 Act, and, as it is not one of the tenant-right matters included in Part II of the Fourth Schedule, there is no saving for the pre-existing rights of a tenant in occupation on March 1, 1948. Unless some remedy can be found such tenants may discover when they quit that they are unable to obtain compensation for something for which they paid at their incoming.

There is, however, a possible remedy. If the Minister of Agriculture were to exercise his power under section 78 of the 1948 Act, to vary the provisions of the Fourth Schedule by adding acclimatisation, hefting and settlement to the tenant-right matters already included in Part II thereof, it would be possible to preserve the rights of such sitting tenants. Such an order would at the same time give a new statutory basis of compensation in the case of a tenant-right matter which appears to be of considerable importance in hill farming districts. The Committee on Agricultural Valuation recommend the Minister to take this step, and it is to be hoped that he will do so. The machinery required is an order approved by both Houses of Parliament.

The Committee discuss other types of customary compensation in relation to section 64 of the 1948 Act, but make no recommendation in regard to them. Their discussion is of great interest to the specialist, and is worthy of study by all practitioners who deal with agricultural tenancies, but it would not be appropriate to deal with it further here.

It should perhaps be mentioned that there is nothing to prevent the parties to a written tenancy agreement from expressly providing for compensation to be paid in respect of tenant-right matters which are not included in Part II of the Fourth Schedule. It may be

desired to provide compensation in respect of matters not so included which were formerly the subject of customary compensation. It will, however, be necessary to specify such matters in detail in the written agreement and to prescribe how the compensation is to be calculated. The draftsman who is instructed to incorporate in a tenancy agreement rights to compensation formerly governed by local custom should be provided with a report thereon from a qualified agricultural valuer in the district.

The Customs of Pre-entry and Holdover

It has already been emphasised that section 64 of the 1948 Act abolishes customary agricultural compensation, but does not interfere with agricultural customs generally. There are a number of agricultural customs which are not concerned with compensation. Two of the most important of these are pre-entry and holdover. Pre-entry is the custom by which an ingoer is permitted to enter the land, or part of it, before his term-day to prepare the soil or to sow, *e.g.*, before a spring term-day to sow spring corn or seeds or before an autumn term-day to break leys and stubbles and sow winter corn. Holdover is the custom by which an outgoer remains in possession of part of the land and buildings after his term-day for the purpose of consuming produce or of harvesting, threshing and marketing crops. These primitive rights to enter or to remain on the land still exist as customs in many parts of the country, although they have sometimes been commuted for cash. Where they exist they will be deemed to be part of any agricultural tenancy agreement unless they are expressly excluded. Draftsmen of such agreements should either exclude them or should set out in precise terms the detailed content of the rights which it is intended should apply.

The Committee on Agricultural Valuation make no recommendations for legislation at present in regard to pre-entry and holdover. They recognise that these rights are often necessary and useful. They suggest, however, that their operation should not be left to custom but should be regulated by the tenancy agreement. Custom varies between different districts, and, moreover, custom does not apply to certain cash crops of modern origin, such as sugar beet, although a right of holdover in respect of such crops is desirable. The Committee express the view that in the case of Michaelmas tenancies a right of holdover is particularly desirable, in order to enable the outgoing tenant to harvest and market corn, sugar beet,

potatoes and similar cash crops which the tenant is entitled to grow in the last year of his tenancy. Such a right of holdover is not only fair to the outgoing tenant, but tends to encourage tenants to grow in the last year of their tenancies crops which may from the national point of view be of great value.

The moral for the draftsman of agricultural tenancy agreements is that a properly defined right of holdover should be incorporated in every well-drawn Michaelmas agreement. It is a matter for consideration and discussion with his client and with his client's land agent or agricultural valuer whether other rights of holdover or rights of pre-entry should be included in the agreement in any particular case. The golden rule is to exclude custom expressly and to set out all such rights fully in the agreement.

Customary Term-Days

The Committee have noted no less than thirty different term-days, *i.e.*, days on which agricultural tenancies begin and end, in different parts of the country. These term-days are customarily one of the recognised quarter-days. The most usual series of quarter days is that connected with the "Ladyday" year, *i.e.*, Ladyday (March 25), Midsummer (June 24), Michaelmas (September 29) and Christmas (December 25). In the North of England, however, a different series of quarter days is found, connected with the "Candlemas" year. In both cases there are variations, since some districts continued to use the term-days of the old calendar after the calendar was changed in 1752. In addition to the term-days of the "Ladyday" year and the "Candlemas" year, there are some other customary term-days connected with different series of quarter-days.

The Committee set out in their report the following interesting table showing the dates of the various term-days known to them. The dates in brackets are local variations, found in certain districts, of the more usual term-days.

THE "LADYDAY" YEAR

	New Calendar	*Old Calendar*
Ladyday	25th March	6th April (5th April)
Midsummer	24th June	6th July
Michaelmas	29th September	11th October (6th October) (10th October)
Christmas	25th December	6th January

THE "CANDLEMAS" YEAR

	New Calendar	*Old Calendar*
Candlemas	2nd February	13th February (12th February) (14th February)
May Day	1st May	13th May (12th May)
Lammas	1st August	13th August (12th August)
Martinmas	11th November (13th November)	22nd November

OTHER CUSTOMARY TERM-DAYS

	New Calendar	*Old Calendar*
New Year's Day ..	1st January	12th January
Whit-Sunday ..	15th May	26th May
St. Andrew's Day ..	30th November (1st December)	12th December
St. Thomas's Day ..	21st December	1st January

The Committee point out that in some districts there are good reasons for the term-days in customary use. In the hill farms of the North or Wales changes of tenancy take place before or after lambing, *e.g.*, at Candlemas or May Day or Whit-Sunday rather than at Ladyday. There are, however, many variations which have no justification and have continued to exist through force of tradition. The Committee do not, however, recommend that the multiplicity of customary term-days should be reduced by legislation. They prefer to appeal to those responsible for the creation of agricultural tenancies to introduce some uniformity. The draftsman can do his part here, by suggesting in appropriate cases that the advice of the Committee should be carried out.

Ladyday is probably the term-day most commonly used and the Committee recommend that it should normally be adopted. They prefer old Ladyday to new Ladyday (April 6 instead of March 25) as it gives rather more time for the completion of the appropriate seasonal operations. Where a Michaelmas tenancy is considered necessary they recommend old Michaelmas (October 11) rather than new Michaelmas (September 29) for the same reason. In hill farming districts the Committee recognise that different term-days may be necessary because of the lambing question. They recommend that in such cases May 13 (old May Day) should be the normal term-day, or, if it is desirable that the changeover should take place before lambing, February 2 (Candlemas).

The Committee's suggestions in regard to term-days are, therefore, that they should be reduced to four, namely :—

April 6	For general use.
October 11	Where an autumn change is considered necessary.
February 2 or May 13 ..	Where hill sheep flocks are kept.

It is to be hoped that landlords and tenants and their professional advisers will adopt the Committee's suggestions. The Committee's decision to rely upon the achievement of uniformity by voluntary effort rather than by legislation is refreshing, and deserves success.

THE RETROSPECTIVE LEASE

By Peter Brett, LL.B., Solicitor

"It is a very common experience that in the creation of leasehold interests the term which is created is expressed to run as from a date anterior to the date of the document which creates the term". This remark of Clauson, J., in *Cadogan* (*Earl*) v. *Guinness*, [1936] Ch. 515, is perhaps even truer today than it was some fourteen years ago. It is, therefore, opportune to consider some of the difficulties which may ensue from this mode of procedure, especially as two cases reported this year have drawn attention to the matter.

In *Goldberg* v. *Edwards*, [1950] W. N. 16, the plaintiffs sought an injunction to restrain interference with their use of one of two means of approach to an annexe which they held under a lease dated July 10, 1947, for two years from January 18, 1947. The previous tenants of the annexe had not used this means of approach, but the plaintiffs had begun to use it as soon as they went into possession (in January, 1947), and it was found as a fact that on July 10, 1947, they were actually enjoying the user. In those circumstances, the Court of Appeal held that they were entitled to an injunction. The right, being one actually enjoyed with the demised premises, was capable of passing under the grant by virtue of section 62 of the Law of Property Act, 1925—cf. *Wright* v. *Macadam*, [1949] 2 All E. R. 565—and the "time of conveyance", within the meaning of that section, was the date of execution of the lease.

In *Colton* v. *Becollda Property Investments, Ltd.*, [1950] 1 K. B. 216, the plaintiff tenant sought to recover from the defendant landlords certain moneys he had paid to them by way of premium for a lease of controlled premises. He had been a statutory tenant of the premises, and had negotiated for the grant of a lease. The negotiations were completed on or before September 28, 1948, and it was agreed that he should be granted a lease for fourteen years from September 29, 1948, at a premium. The lease was executed on January 7, 1949, and the plaintiff claimed that he was entitled to recover the moneys paid in respect of the premium under section 8 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (now repealed by section 2 (7) of the Landlord and Tenant (Rent Control) Act, 1949), on the ground that the lease

was in fact for less than fourteen years. The Court of Appeal held that he was not, on a true construction of section 8, entitled to recover, but they agreed that the lease was not a lease for fourteen years. The case is noteworthy, apart from the actual decision, because it contains some interesting *obiter dicta* by Denning, L.J., which will be noticed later.

These cases illustrate the principle that, in order to determine the extent of the premises and the *quantum* of the estate demised, the material date is that of the grant, and not that mentioned in the *habendum*, where the latter is anterior to the former. The principle is an old one—see, for example, *Dinsdale* v. *Isles* (1673), 3 Keb. 207; until the grant is made, there can be no estate transferred.

Another well-settled principle is that where certain matters are to take effect at the expiration of a stated number of years of the term granted, the years are to be computed from the date mentioned in the *habendum*, not from the date of the grant. Illustrations of this are to be found in *Mayn* v. *Beak* (1596), Cro. Eliz. 515, where the rent was to increase after ten years, and *Bird* v. *Baker* (1858), 1 E. & E. 12, where there was a power to determine the term at the expiration of the first seven years. *Dickinson* v. *St. Aubyn*, [1944] K. B. 454, is a more recent example, although the point of construction involved was influenced by a consideration of other expressions used in the document.

The principles so far discussed appear to be well established, and it is only their application to specific cases that is likely to occasion any difficulty. What is, however, far from clear is the extent to which the parties are bound by the covenants contained in the lease during the period before its execution. Of course, if the covenant is expressed to have effect "from the date hereof", no question can arise. But where the covenant is to be effective "during the term", there has been some conflict of judicial opinion, and it is necessary to examine the cases in some detail.

The earliest case appears to be *Lewis* v. *Hillard* (1667), 1 Sid. 374 (also reported *sub nom. Lewis* v. *Hellior* in 2 Keb. 291, 376). An action of covenant was brought on an indenture of lease for nine years from June 1, 1665, and containing a covenant to save the plaintiff harmless from all evictions during the term. The breach alleged was an eviction on June 26, 1665, the plea that the deed was first delivered on June 1, 1666, and that there was no breach before that date. It was held that the words "during the term" meant during the term in computation, and not merely from the time of delivery of the deed, when that first commenced in point of interest; and judgment was given for the plaintiff.

This case was cited to the Court of Exchequer Chamber in *Shaw* v. *Kay* (1847), 1 Exch. 412. The plaintiff landlord brought an action for breach of the repairing covenant contained in a lease made on November 9, 1842, for a term expressed to be from June 22, 1842. The defendant lessee had entered in June, 1842, and had made alterations in breach of the covenants contained in the lease. The trial Judge directed the jury that the plaintiff could not recover in respect of breaches occurring before the lease was executed, and the Exchequer Chamber refused to grant a new trial on the ground of misdirection.

There is a further report of this case in 17 L. J. Ex. 17, but it appears that the Court did not give any reasons for its decision. Pollock, C.B., observed in argument, after the citation of *Lewis* v. *Hillard* (*supra*), that a party may covenant to indemnify against what has been done before the date of the covenant. It seems, however, that the Court relied on a *dictum* of Eyre, C.J., in *Wyburd* v. *Tuck* (1799), 1 Bos. & P. 458, where he said, at p. 464 :—" On the last point there can be no doubt. The *habendum* of the plaintiff's lease can only be considered as marking the duration of his interest, and its operation as a grant is merely prospective ".

There can be no doubt, as we have seen, of the correctness of this *dictum*, so far as it goes. A lease, however, commonly operates both as a grant and by way of covenant. This ambivalent nature of the transaction has given rise to much difficulty, and is aptly illustrated by the divergent views of the Law Lords, in *Cricklewood Property and Investment Trust, Ltd.* v. *Leighton's Investment Trust, Ltd.*, [1945] A. C. 221, on the question whether the doctrine of frustration can ever apply to a lease. It is clear from the context that Eyre, C.J., was not considering the operation of covenants contained in retrospective leases, and if in *Shaw* v. *Kay* (*supra*), the Court considered itself bound by his *dictum*, its decision is open to criticism. However that may be, the case has not been overruled, and it is cited in the leading textbooks (Foa, Hill and Redman, and Woodfall) as authority for the proposition that a tenant is not liable for breaches of covenant occurring before the lease is executed.

In *Jervis* v. *Tomkinson and Others* (1856), 1 H. & N. 195, the plaintiff sued for breaches of the covenants contained in a mining lease which he had granted to the defendants on November 16, 1852, for a term of twenty-one years from June 25, 1851. The lease was granted pursuant to an agreement made between the parties on August 29, 1851, and both the agreement and the lease contained a proviso that the term should cease if certain events

occurred " during the continuance of the term ". In fact, the contemplated event occurred after the agreement but before the grant of the lease, and the defendants pleaded that this had caused the term to cease and that accordingly there had been no breach. This plea was rejected, Pollock, C.B., saying, at p. 207 :—

> " To cause the proviso to operate, there must have been a failure by inevitable accident after November 16, 1852, for the proviso clearly refers to some future inevitable accident, and that, during the continuance of the term, which did not begin until that day, whereas the accident . . . is found . . . to have occurred before the date of the lease ".

This language supports the decision in *Shaw* v. *Kay* (*supra*), but there can be no doubt of the correctness of the decision. However, a proviso for cesser or forfeiture seems clearly to be on a different footing from a covenant, as there can hardly be a cesser or forfeiture of a term which has not yet come into being.

It remains to notice two conflicting *obiter dicta* on this matter. The first of these observations are to be found in *Anderson* v. *Oppenheimer* (1880), 5 Q. B. D. 602, where the plaintiff tenants sought to recover damages from their landlord in respect of the flooding of their premises by a burst cistern. Their lease was granted on October 22, 1872, for a term of twenty-one years from March 25, 1872, and they based their claim partly on the covenant for quiet enjoyment " during the said term ". It was held that, although the flooding did not occur until 1876, the only act of the landlord which could possibly be considered a breach of the covenant was the installation of the cistern, which had taken place in 1871 ; and the claim was rejected. Brett, L.J., referred to this point, at p. 607, in the following words :—

> " I think that the covenant is prospective in its operation. The defendant covenants that as from the time of granting the lease the plaintiffs' enjoyment of the premises demised to them shall not be obstructed. . . . After the lease had been granted, there was no breach ".

Similarly Cotton, L.J., said at p. 608 :—

> " In my opinion the words of the covenant only refer to acts done after the lease has been granted ".

This language undoubtedly goes beyond what was necessary for the decision, but the observations of two such distinguished Judges cannot lightly be disregarded.

In the recent *Colton Case* (*supra*), Denning, L.J., also made some observations on this matter, but in the opposite sense. After pointing out that the tenant frequently goes into occupation while negotiations are still pending, and that, when the lease is drawn

up, it is expressed to start as from the date of such occupation, he continued, at p. 231 :—

> " In such cases, in point of law the legal interest of the tenant starts from the date when the lease was executed : *Earl of Cadogan* v. *Guinness* (*supra*). But as between the parties it may start from the date stated in the lease, because the parties, by their agreement, have related its commencement back to the date when the tenant went into occupation. This relation back is not to be regarded as a nullity; it may often mean that the conditions and covenants of the lease relate back to that time also. Whether they do so or not depends on the true construction of the lease. The cases of *Shaw* v. *Kay* (*supra*), and *Jervis* v. *Tomkinson and Others* (*supra*), turned on the construction of the leases there in question ".

With respect to the learned Lord Justice, it is difficult to justify his explanation of *Shaw* v. *Kay* (*supra*). There is nothing in either report of the case to suggest that the Court decided the case as a matter of construction. It is probable, however, that the remarks of Denning, L.J., accurately reflect the intention of the parties in the majority of cases.

The cases so far considered have been concerned solely with the question whether a party can be held liable on a covenant entered into after the alleged breach. We must now notice one decision in which a tenant was held liable by using a different method of approach. In *Carrington Manufacturing Co., Ltd.* v. *Saldin and Others* (1925), 133 L. T. 432, the plaintiff landlords sought to make the defendant liable for a breach of the covenant against underletting contained in a lease executed on July 24, 1923, whereby the tenant had been granted a term of fourteen years from March 25, 1923. The parties had entered into an agreement in writing for the lease on January 10, 1923, and the tenant was let into possession pursuant to the agreement. The underletting took place on April 3, 1923, but this fact was unknown to the plaintiffs at the time when the lease was executed. The plaintiffs were held to be entitled to recover. Lord Hewart, C.J., held that the tenant's argument, that because the lease had not been executed at the material time there could be no breach, could not prevail against the doctrine of *Walsh* v. *Lonsdale* (1882), 21 Ch. D. 9, and said, at p. 434 :—

> " In my view, the rights and obligations of the parties in this case are the same in all respects as they would have been if the lease had been executed immediately after the agreement ".

It would appear that on the facts of this case *Walsh* v. *Lonsdale*

(*supra*) was rightly applied, but the learned Lord Chief Justice made the following remarks earlier in his judgment :—

> " Where a lease has in fact been granted in pursuance of the agreement, I am of opinion that the question whether relief was capable of being given by specific performance does not arise. The necessity for this condition is superseded by the fact of the lease having been granted ".

This statement seems to go too far. In *Gray* v. *Spyer*, [1922] 2 Ch. 22, Warrington, L.J., said at p. 34 that, where a party seeks to invoke the principle of *Walsh* v. *Lonsdale* (*supra*), it is an essential condition that the agreement on which he bases his case be found to be an agreement of which a Court of equity would decree specific performance. Moreover, it is apparently necessary that the party invoking the doctrine should be in a position to compel specific performance. Such is the sense of the judgments of the Court of Appeal in *Lowther* v. *Heaver* (1889), 41 Ch. D. 248, and *Swain* v. *Ayres* (1888), 21 Q. B. D. 289; and when the point arose for decision, Horridge, J., decided to that effect in *Inland Revenue Commissioners* v. *Derby* (*Earl*), [1914] 3 K. B. 1186.

The doctrine of *Walsh* v. *Lonsdale* (*supra*) may thus considerably reduce the area in which the parties to a retrospective lease can raise the plea that the covenant which it is sought to enforce had not been made at the time of the alleged breach. And if the tenant was in possession at that time, there may be yet another line of attack open to the landlord. In *Hamerton* v. *Stead* (1824), 3 B. & C. 478, Littledale, J., said, at p. 483 :—

> " When parties enter under a mere agreement for a future lease they are tenants at will; and if rent is paid under the agreement, they become tenants from year to year, determinable on the execution of the lease contracted for, that being the primary contract ".

Furthermore, in *Richardson* v. *Gifford* (1834), 1 Ad. & El. 52, Parke, J., said that tenants of this kind hold on the terms of the agreement under which they enter, so far as those terms are not inconsistent with that kind of tenancy; in that case the tenant was accordingly held liable for failure to keep the premises in tenantable repair, although the lease containing his covenant to do so was avoided by the Statute of Frauds. *Bowes* v. *Croll* (1856), 6 E. & B. 255, contains an interesting discussion on the tests which determine whether the covenant set up is inconsistent with a yearly tenancy.

There may, however, still remain a number of cases where the

party alleging a breach is forced to rely solely upon the covenant in the lease which is eventually executed. A modern example of this kind of case is *Bennett* v. *Kidd*, [1926] N. Ir. 50. The parties entered into an agreement for a lease on May 23, 1922, and the defendant was let into possession. He erected a number of temporary buildings on the site, which was on February 2, 1924, leased to him for a term from May 1, 1922. The lease contained a covenant by the tenant that he would not erect any building of a value less than £16, but the agreement had not contained this covenant; the landlord could thus derive no assistance from *Walsh* v. *Lonsdale* (*supra*). Moore, C.J., held that the case was governed by *Shaw* v. *Kay* (*supra*), and that the defendant was not liable, as the alleged breaches had occurred before the execution of the lease.

The question of construction may also arise where a breach of a covenant to repair after the execution of the lease is alleged; for, as Parke, B., pointed out in *Walker* v. *Hatton* (1842), 10 M. & W. 249, a general covenant to repair must be construed to have conference to the condition of the premises at the time when the covenant begins to operate. Whenever the question does arise, it will perhaps need a decision of the House of Lords to reconcile the conflicting decisions and *dicta* which have been considered.

In the meantime, it should be remembered that, where a question of construction arises, the intention of the parties prevails, and if that intention is clearly expressed no dispute can occur. In a retrospective lease, such expression could be effected by including a provision that the lease shall for the purpose of determining the rights and obligations of the parties be construed as if it had been executed on the day from which the term is expressed to run. It is for practitioners to consider whether such a provision should not be included, as a matter of common form, in leases where the term is expressed to run as from a past date.

"PURPOSE TRUSTS", POWERS AND CONDITIONS

By A. K. R. KIRALFY, PH.D., LL.M., Barrister-at-Law

Most cases of "purpose trusts" are dealt with simply on the basis that they are charitable or void for perpetuity. But several recent cases have seriously considered the nature of such "purpose trusts", notably *Re Wood*, [1949] Ch. 498, and *Re Wightwick*, [1950] 1 All E. R. 689. *Re Wood* has been referred to previously (13 *Conveyancer* 379, 418). *Re Wightwick* turned on the problem of perpetuity but restated the usual judicial terminology. Wynn-Parry, J., referred to "a trust" to apply income towards the furtherance of certain objects, and to "a trust of income for a purpose", and treated the income as appropriated to the object of the trust for an indefinite period. It is the aim of this article to remind readers that the notion of a "trust" is here used by the Courts in a very special sense, and that the rules which apply to unenforceable "purpose" trusts, not charitable in nature, cannot be applied to trusts for human beneficiaries. The existence of such trusts is not a sign that the general principles of enforceable trusts are becoming relaxed, for the truth is that such "purpose trusts" are not trusts at all, any more than a "power in the nature of a trust" or the "trust" binding a mortgagee in his dealings with the land charged.

There is little real dispute as to the legal incidents of the so-called "unenforceable trust". The law has seen fit to permit a testator to direct the application of the income of property by his executors or trustees to some sufficiently defined purpose, provided it is limited to the period allowed by the Rule against Perpetuities. But this subject is made more difficult to understand by the modern insistence that a trust is constituted by this direction. There is in fact no need to succumb to this temptation, which involves the further anomaly, that the Rule against Perpetuities, which we know to be concerned solely with the vesting of contingent future interests, is here apparently applied to the duration of the trust. In the past most of the valid directions of this kind have concerned domestic animals or tombs, but, in principle, there is no reason to confine these directions to such purposes, and every reason to expect increased use of such directions in the future. Equity already commands conceptions which adequately explain the "purpose trust" without resorting to a new equitable development

for the purpose. Mr. D. C. Potter, in a recent leading article (13 *Conveyancer* 418) welcomes the "purpose trust" and equates it, very properly, with discretionary trusts and trusts for maintenance, concluding (p. 424), "there is no fixed dividing line between trust and power". It is this last point on which the present writer prefers the traditional division. The application of the perpetuity rule to trusts is different from its application to powers. The so-called "purpose trust" is treated, as Mr. Potter admits, in the same way as powers. The proper conclusion is submitted to be this, that neither the "purpose trust" nor the "discretionary trust" should be mistaken for "trusts" in the classical sense of enforceable personal trusts, but should be equated for most purposes with powers of appointment. The word "trust" should be reserved for obligations enforceable at the instance of personal beneficiaries, vested equitable interests which are free from problems of perpetuity, interests which have "duration". These other special cases should stand apart, as cases where no interest is vested in any beneficiary, but a power is created which, if it creates interests at all, creates them from time to time at the trustee's discretion. In the meantime there is no difficulty in vesting the beneficial interest in some other person, subject to divesting. In the case of the "unenforceable trust", this is produced by the resulting trust for the residuary legatee or next-of-kin if the direction is disobeyed. In the case of the power of appointment it is the class taking in default of appointment. In the case of discretionary trusts it is the person who would take if no discretion were exercised, or, where all the beneficiaries are ascertained but their shares left undetermined, it is the class of objects of the discretionary "trust", equally. The perpetuity rule applies to the vesting of each separate payment or application, when the power is exercised, as in the case of a special power, and the anomaly of the Rule against Perpetuities affecting the duration of an interest is eliminated.

No originality is claimed for these observations; they are simply a recension of well-established authorities, which have not, however, been completely appreciated in the past. Thus *Gray on Perpetuities* (4th ed., 781), in dealing with the "unenforceable trust", describes it as follows: "The method of carrying out a donor's intention in favour of a non-charitable object appears to be based upon the theory that, although no trust enforceable in favour of the designated object has been created, the person to whom the property is given upon trust ought to have the *power* (my italics) to apply it for the designated object, if he chooses, subject to a trust, if he does not exercise the power, for the

residuary legatees or other persons who would take if the attempted trust for the non-charitable object were altogether disregarded ". In dealing with the validity of interests subject to such a trust he says (*ib.*, p. 783), " If the designated trustee is not considered as holding on a trust in favour of the designated object, but as the donee of a *power* exercisable in favour of that object, with a resulting trust in default of the exercise of the power, then there is no need for any such special rule to cover the situation. Interests taking effect in default of the exercise of a power are vested; the effectual exercise of the power divests such interests; and if the power is invalid, such interests stand as if the power had been omitted ". This view was shared by Mr. W. O. Hart (1937) 53 L. Q. R. 29 ff., stating (at p. 33), " Unenforceable but valid trusts are of course anomalous. They partake rather of the nature of *powers* or mandates than of trusts ". The consensus of American opinion is expressed in the *Restatement of Trusts* (art. 124): " Where the owner of property transfers it upon an intended trust for a specific non-charitable purpose and there is no definite or definitely ascertainable beneficiary designated, *no trust is created but* the transferee has *power* to apply the property to the designated purpose ".

The discretionary trust is a bad example to adduce in order to prove the validity of an " unenforceable trust ". It is itself more properly described as a power, and an exception to the general law of trusts. Gray points this out in the case of the unenforceable trust (at p. 784). " The power here is not materially different from any other discretionary dispositive power held by a trustee, for instance a power to pay over principal to a life beneficiary or a power of maintenance ". At another place (p. 781, note 8) he says, " The term ' discretionary trust ' is commonly used in a variety of cases to describe what is in reality a power " (citing 2 Jarman, *Wills*, 876, 908). The same point is made by Mr. J. H. C. Morris [1950] Camb. L. J. 392 at 408, " The discretionary trust was tantamount to a power of appointment or disposition ". No interest is vested in anyone under such a trust until the discretion is each time exercised (Cheshire, *Real Property*, 6th ed., 495) unless the objects are together absolutely entitled, in which cases it is vested in them and they can terminate the trust (*Re Smith*, [1928] Ch. 915).

At another point Gray says (p. 278), " These discretionary trusts, however, were in effect powers of appointment or disposition. Whether such powers are exercisable by the trustees or by a beneficiary the invalidity of the power does not affect the validity

of the limitation in default of exercise of the power or the validity of subsequent limitations".

There are a few other less usual forms of apparent trusts which are in reality powers and which are subject to the Rule against Perpetuities. An example is the case of *Re Johnson*, [1943] Ch. 341, in which trustees were directed to make up the income of a beneficiary to a certain amount. This was held to create a provision for a number of separate contingent annual gifts and not to limit any immediate vested interest to the beneficiary.

It appears to be clear that the ordinary perpetuity rule applies to "purpose trusts", for the reasons given above, and not any special rule. The ordinary rule, with the ordinary period of lives in being and twenty-one years, is applied to discretionary trusts, which are of the same nature as "purpose trusts" (*e.g.*, *Re Coleman*, [1936] Ch. 528). In the usual trusts for human beneficiaries it is possible to find an "implied" life in being, with whose life the vesting of a gift over has some obvious connection (*e.g.*, in *Re Gaite*, [1949] 1 All E. R. 459, in a gift to grandchildren, the children were taken as lives in being). The alternative is to specify certain lives in being. Here lives of beneficiaries will commonly be taken, but the law permits any ascertainable lives to be used, *e.g.*, those of members of the Royal Family. At the present day living descendants of His late Majesty, King George V, might be specified (*Re Villar*, [1929] Ch. 243, *Re Leverhulme*, [1943] 2 All E. R. 274, esp. at p. 280). It seems that the same method is open to the founder of a "purpose trust". The founder will probably in no way connect his trust with the lives of relatives and will select outside lives, such as those of royalty. If he fails to limit his trust to the perpetuity period the entire trust will fail (*e.g.*, yacht racing, *Re Nottage*, [1895] 2 Ch. 649; opposition to vivisection, *Re Wightwick*, [1950] 1 All E. R. 689).

A special problem might arise where a loose saving clause is used. *Re Hooper*, [1932] 1 Ch. 38, was a case in which trustees were directed to maintain a grave "so far as they legally can do so". It was held (following *Pirbright* v. *Salway*, [1896] W. N. 86) that the income could be used for twenty-one years only. Application for fifty years, as permitted in *Re Dean* (1889), 41 Ch. D. 552, would hardly be permitted today. A saving clause will therefore only operate for the gross term and no lives will be implied as lives in being. In one case, of a true limitation by power of appointment to an ascertained class of human beneficiaries, the law appears to permit a wider operation to a saving clause. In *Re Vaux*, [1939] Ch. 465, a power of appointment to various objects was given, with

a proviso that all dealings " shall be within the limitations prescribed by law ". It was held that the donee of the power might incorporate any life, actually in being when the power was created, into the appointment, to restrict it within the perpetuity period. But this case seems inapplicable to the " purpose trust ". In the first place an executed trust should be complete in terms, whereas a power must be followed by a further instrument at the time of any appointment, which can supply the details. In the second place the terms of the power usually suggest lives with which the vesting of the gifts under the appointment have some obvious connection. These objections appear too strong to permit the argument that, since a " purpose trust " is in fact like a power of appointment, it might be regarded as executory, and permit the trustees to select their own " lives in being ". It would be difficult to control the numerous applications of income and ascertain which lives the trustees had in fact been treating as the lives in being.

A more hopeful plan was that of avoiding any direction to apply to the " purpose " and incorporating it innocently in the limitation of the gift. This succeeded in the famous case of *Re Chardon*, [1928] Ch. 464. There income was to be paid to a company so long as it maintained a grave. The Court held that this was a valid limitation of property, analogous to a determinable fee in realty, and not subject to the rule against perpetuities. This decision was recognised as valid in *Re Wightwick* (*supra*) where it was pointed out that no direct gift for the purpose had been made in *Re Chardon*.

Wynn-Parry, J., pointed out that no income was appropriated by the testator in *Re Chardon* to the maintenance of the grave. There was neither a trust to apply, nor even a power to apply such income. The company could use other funds of their own to maintain the grave. *Gray on Perpetuities* (4th ed., 79 (9)) is similar : " In *Re Chardon* there was no trust for the maintenance of graves, and no question of a mere power. The trustees held subject to a valid trust to pay to the cemetery company so long as the latter complied with the condition. The cemetery company took subject to the condition or special limitation, but not upon trust ".

This doctrine would allow testators a much more enduring method of securing the application of income to their favourite purposes after death. But some shadow is cast over this dream of posthumous power by the interesting decision in *Hopper* v. *Liverpool Corporation*, [1944] 88 S. J. 213, which has nowhere else been reported and which appears to have been rather neglected by

legal writers. Sir John Bennett, Vice-Chancellor of the Lancaster Palatine Chancery, had there to deal with a gift of land to trustees of an institution "so long as the said building should continue to be used for the purposes of its institution." The learned Judge held that this created a determinable fee, and that the gift was not void for repugnancy, but he applied the rule against perpetuities to the limitation and struck out the restricting clause, leaving the trustees of the institution entitled in fee simple absolute. Now, if this decision is correct, the assumption underlying *Re Chardon* falls to the ground. *Re Chardon* was, of course, cited in *Hopper's Case* but the learned Vice-Chancellor held : "I cannot but think that if the rule against perpetuities applies to the possibility of reverter on a fee subject to a condition which may or may not happen, it must equally apply to a possibility of reverter on a fee limited to determine on an event which may or may not happen." A purist may quarrel with the use of "right of reverter" in the first reference; what was meant was the right of entry held to be subject to the perpetuity rule in *Re Hollis*, [1899] 2 Ch. 540 (now L. P. A., 1925, s. 4). Sir John Bennett also held the restriction void for uncertainty. It is not clear whether the determinable fee would have become absolute had it been certain. The conclusion is in any case difficult to understand, from a technical point of view, though laudable in its result. If a limitation is void for uncertainty the whole gift is generally said to fail, and the gift does not become absolute. This appears from Lord Romer's judgment in *Sifton* v. *Sifton*, [1938] A. C. 656, at 677, where a trust to pay until the happening of an uncertain event was said to fail altogether. In the case of failure for perpetuity the principle appears to be the same. Tomlin, J., in *Re Wilkinson*, [1926] Ch. 842, at p. 847, referred to a limitation until the happening of an event and hinted it might be wholly bad if against public policy. This last case still stands, in spite of *Sifton* v. *Sifton* (*supra*) (*Re Coxen*, [1948] Ch. 727, at 760). It also agrees with the decision in *Re Moore* (1888), 39 Ch. D. 116, that a gift is void altogether if determinable on an invalid condition by way of limitation and not proviso or defeasance.

THE RIGHT TO CLAIM CONTRIBUTION FOR REPAIRS TO PARTY WALLS

By John Nance, ll.b., Solicitor

The rash of building which between the two wars covered the face of the English countryside multiplied out of all proportion the number of party structures. They seem to have been the particular pet of the provincial conveyancer. In thousands of building estates from Cornwall to Northumberland every wall and fence is either by express declaration or by presumption a party wall or fence. One can imagine the solicitor explaining to his client that it would be inequitable that these single and often frail partitions should belong exclusively to one or the other of two adjoining owners. "It is only fair", he would point out, "that they should be made a joint benefit and a joint burden—that concurrent rights should be coupled with concurrent responsibilities". Now, twenty years afterwards, a great many of these party structures are beginning to show signs of disrepair. No doubt the solicitor's ethics were unexceptionable; but what of his law?

There is an old classification of party walls made by Fry, J., in *Watson* v. *Gray* (1880), 14 Ch. D. 192, which textbook writers since have accepted with gratitude. He distinguished four sorts :

Class 1. A wall of which two adjoining owners are tenants in common;

Class 2. A wall divided laterally [horizontally or vertically] into two strips, one half of the thickness belonging to each owner with no cross-easements of support between them;

Class 3. A wall belonging entirely to one owner, but subject to an easement in the other to have it maintained as a dividing wall;

Class 4. A wall divided laterally into two strips each strip being subject to a cross-easement in favour of the owner of the other.

It might be said of that classification, that where there were two persons having common interest in a wall, and their interests could not be shown to fall into Classes 2, 3 or 4, then they fell into Class 1. It is a very old rule of law that common user *prima facie* creates common property (*Cubitt* v. *Porter*, 8 B. & C. 257); and the presumption of common ownership applied in all cases when it

was unknown how much land had been contributed by each adjoining owner. Bailey, J., in *Wiltshire* v. *Sidford* (1827), 1 Man. & Ry. 404, observed that " when a builder of two houses grants off one it is more reasonable to presume he grants the whole wall in undivided moieties than that he should leave either party the power of cutting the wall in half ". But though the presumption was probably inevitable as a matter of convenience, it was not encouraged where any evidence to the contrary could be found. The objection to common ownership was this : that either owner could sue for partition, and on partition a wall would be created not of Class 4 with cross-easements but of Class 2 with no rights over the other moiety at all.

Class 1 walls, which had become numerous on the new building estates by 1925, called for special treatment in the Law of Property Act of that year. In the absence of such treatment, they would have become subjected to a trust for sale. The Act dealt with the situation which did before 1926, and would still save for the provisions of the Act, create a common ownership in this way. Where, immediately before the commencement of the Act, a party wall was held in undivided shares, the ownership should be deemed to be severed vertically as between the respective owners, and the owner of each part should have such rights to support and user over the rest of the structure as might be requisite for conferring rights corresponding to those subsisting at the commencement of the Act (Sch. 1, Part V); and where, after the commencement of the Act, under a disposition or other arrangement which, if a holding in undivided shares had been permissible, would have created a tenancy in common, a wall was or was expressed to be made a party wall, then that wall should be and remain severed vertically as between the respective owners, and the owner of each part should have such rights to support and user over the rest of the wall as might be requisite for conferring rights corresponding to those which would have subsisted if a valid tenancy in common had been created (section 38).

It will be noticed that the draftsman has substituted " vertically " for Fry's more comprehensive " laterally ". Vertical division is undoubtedly the common case, but it is not the only case. The Scottish practice of selling flats has spread south of recent years, and between flats there will be horizontal divisions the ownership of which it would be decidedly awkward to partition. It is to be assumed that the word " vertically " will be stretched in practice to include " horizontally ", to the affront of etymologists.

Then nothing is said of the nature of the " rights to support and user ". Are they equitable or legal? If they were equitable they

would all require registration under the Land Charges Act as Land Charges of Class D (iii); but since they are undoubtedly capable of subsisting as legal interests under the Law of Property Act, s. 1 (2) (a) it is more convenient to assume that that is what they are. If legal, legal what? The sensible answer would seem to be that they are easements, largely because it is difficult to see what else they could be. Easements of support are well established, and easements of user in connection with walls (as to grow fruit trees against them) appear from time to time in old conveyances. L. P. A., then, would appear to have had the effect of abolishing Class 1 walls altogether, and placing all the walls that were or would have been in that category in Class 4 (walls divided laterally and subject to cross-easements).

Here a difficulty arises. The cross-easements created by L. P. A. are not identical with the cross-easements which existed between the owners of old Class 4 walls before 1926 (and still exist between them today). They are the rights of support and user which before 1926 existed between tenants in common. What were those rights? Since tenants in common were concurrent owners, they could not by action enforce their rights against each other unless one by some overt act had completely ousted the other or completely destroyed the common property. It is accordingly not at all easy to find out what their rights really were. Hunt in his *Law Relating to Boundaries and Fences* (1866) quotes with approval (p. 75) *Gibbon on Dilapidations* to the effect that tenancy in common of a party wall or fence did not imply any obligation on the part of one tenant in common towards his co-tenant to repair. If one tenant in common of a party wall refused to contribute his share to the repairs, he might formerly be compelled to do so by the writ *de reparatione facienda*, but that writ was abolished by the Real Property Limitation Act, 1833, s. 36. In the case of *Leigh* v. *Dickson* (1883), 12 Q. B. D. 194 : on appeal (1884), 15 Q. B. D. 60, it was held that one tenant in common of a house who expends money on ordinary repairs could not by action, either at law or in equity, compel his co-tenant to contribute—his only remedy was to sue for partition; and North, J., in *Mayfair Property Co.* v. *Johnson*, [1894] 1 Ch. 508, at p. 515, said : " It has been suggested that one of [these tenants in common] has an easement of support as against the other. In my opinion there is nothing of the kind. The wall and every part of the wall belonged to them as tenants in common, there is no ground for saying that there is any dominant or any servient tenement, or that any easement of support exists at the present. . . . What they may have acquired twenty years hence [*i.e.*, after partition] is another matter ".

In the only recent case which has any bearing, *Apostal* v. *Simons*, [1936] 1 All E. R. 207, Slesser, L.J., treated L. P. A. as effecting complete partition. Its effect, he said, was that after the coming into operation of the Act only one half of the wall remained the property of the plaintiff : and he held that the owner so created of one half of a wall all of which had been damaged could recover from the person who damaged it only one half the cost of repairing it. In fine, L. P. A. would seem to have created the curiously anomalous position of a kind of partition effected between two tenants in common who nevertheless after partition retain so far as support and user are concerned the same rights as they had before partition, whatever those rights may have been. If *Leigh* v. *Dickson* and *Mayfair Property Co.* v. *Johnson* can be considered as authorities on the point, they would seem to have been pretty exiguous. One wonders in any event what situation can be supposed to arise when a rickety wooden fence is " deemed to be severed vertically ".

Rudall, *Party Walls* (1922), hopefully distinguishes *Leigh* v. *Dickson* on the grounds that the decision refers only to running repairs. " It is apprehended (he says) that where a party wall held in common by owners of adjoining houses, which it divides and which depend on it for support, becomes ruinous, so that its repair is absolutely necessary, and one part owner expends money in repairing and rebuilding it, a Court of Equity would decree contribution on the ground that the expenditure made was in the nature of a salvage payment " ; and he quotes in support of his contention the American case of *Campbell* v. *Mesier* (4 John 334). Unfortunately there seems to be no law of salvage affecting land in England. In the case of *Falcke* v. *Scottish Imperial Insurance Co.* (1889), 34 Ch. D. 234, at p. 246, Bowen, L.J., observed: " The general principle is, beyond all question, that work or labour done or money expended by one man to preserve or benefit the property of another [which, under L. P. A., half the partitioned wall would be] do not, according to English law, create any lien upon the property saved or benefited, nor, even if standing alone, create any obligation to repay the expenditure ". And that observation was recently quoted with approval in the case of *Sorrell* v. *Paget* (1949), 65 T. L. R. 595, by Bucknill, L.J., who added : " There is no doubt that, strictly speaking, salvage is not a recognised head of claim in the common law as it is at sea ", and adopted by Asquith, L.J., who stated that salvage was something, strictly speaking, not in law recoverable for services rendered on land at all.

It does not seem possible, in fact, to define the precise nature of the cross-easements created by L. P. A. As to cross-easements

generally, *Jones* v. *Pritchard*, [1908] 1 Ch. 630, and the earlier case of *Colebeck* v. *Girdlers' Co.* (1875), 1 Q. B. D. 234, would seem to provide solid authority for the proposition that whilst the owner of a servient tenement must not by any positive act destroy or diminish the enjoyment of the easement, he is not bound to prevent that easement becoming destroyed or diminished in the ordinary course of nature. He is under no liability to repair for the benefit of the dominant tenement, but the owner of the dominant tenement must himself repair if he wishes to continue to enjoy his easement, having power for that purpose to enter upon the servient tenement. *Jones* v. *Pritchard* was followed in *Sack* v. *Jones*, [1925] Ch. 235. There is a very odd obiter attributed to Astbury, J., and addressed to defending counsel during the course of that case before judgment—"the plaintiff might possibly have succeeded in making you pay half the expense of putting the wall right"—but no authority is quoted and no mention of contribution is made in the judgment itself (*a*). It would seem that *Jones* v. *Pritchard* principles must apply not only to walls in Class 3 (owned by one, subject to an easement in favour of the other) but also to walls in the modified Class 4 created by L. P. A. unless it in some way can be shown that between themselves tenants in common before 1926 enjoyed different, even if unenforceable, rights.

When we come to walls in Class 2—divided laterally with each half held in severalty by the adjoining owners—it would appear that one proprietor was and is still entitled to pull down that portion of the wall which he owns, even though sufficient support may not be left for his neighbour's part. In the Irish case of *Kempston* v. *Butler* (1861), 12 Ir. C. L. R. 516, a builder, reasonably and without negligence, pulled down a house. The house next door promptly fell flat. At suit of the owner of the fallen house it was held that there was no liability on the builder to provide support; and when a custom amongst the builders in Dublin to support adjoining houses during and after demolition operations was proved in evidence, it was held that the custom was unreasonable! There is a number of old English cases to the same effect including *Wigford* v. *Gill*, Cro. Eliz. 269, *Wiltshire* v. *Sidford* (*supra*) and *Peyton* v. *London Corporation* (1820), 9 B. & C. 725 ("as the plaintiff had not alleged or proved any right to have his house supported by

(*a*) Cf. Hunt's observation in his *Law Relating to Boundaries and Fences*, cited above, at p. 26, concerning ditches and fences between adjoining estates: "each [of two tenants in common] is bound to contribute equally to their maintenance and preservation"—which he does not repeat in his later chapter on the rights of tenants in common and for which he quotes no authority. But since he continues: "and if either party clip the hedge the other cannot maintain trespass against him", he may mean only that one tenant cannot prevent the other from contributing.

defendants, he was bound to protect himself and could not complain that defendant had neglected to do it"). Presumably, he can acquire a right to support by prescription (*Dalton* v. *Angus* (1881), 6 App. Cas. 740) which could prevent his support being withdrawn in an appropriate case—*i.e.*, that his neighbour knew or ought to have known that the house was being supported against his and had so been for upwards of twenty years; but that is only an easement and the principles concerning Classes 3 and 4 will apply where support is withdrawn by natural decay. The situation of the owner of one half of a wall held in severalty which has fallen into disrepair and who requires repair of the whole would, in fact, seem to be particularly invidious. He cannot presumably demand contribution, nor repair the half belonging to his neighbour even at his own expense (unless he has acquired an easement by prescription) without his neighbour's consent, nor presumably (in the absence of an easement) can he even enter upon his neighbour's land for the purpose of repairing his own half without inviting an action for trespass.

It would appear in effect, that where a party wall or fence which through old age has fallen into disrepair is owned by A with an easement in favour of B (Class 3), or where the wall is owned severally by A and B with cross-easements of support (Class 4 and possibly the L. P. A., Class 4, which is now by far the commonest class, as well), and B wants that wall repaired, he must do it himself, at his own expense, without contribution from A; whilst if he comes within Class 2 his only remedy is to strengthen his own wall. *It would accordingly appear prudent, in all cases where party walls are concerned, to obtain from the co-owner an express covenant to contribute to the cost of repairs; and to pass on the benefit of the covenant in any Conveyance.* (See *Smith* v. *Douglas River Catchment Board* (1949), 65 T. L. R. 628, as to the transmissibility of such a covenant). The situation on a building estate where all the walls are by presumption or are declared to be party walls, and covenants to contribute to repair are taken between the builder and each owner independently but there are no cross covenants between the owners themselves, is obscure. It is conceived that where A and B own adjoining plots each having covenanted with C the builder to contribute to the repair of the wall, B who bought after A might be able to enforce the covenant against A as standing in C's shoes; but what about A against B, whose covenant with C was not in existence when A bought?

Under the Public Health Act, 1936, s. 58, if any structure is dangerous or, by reason of its ruinous or dilapidated condition seriously detrimental to the amenities of the neighbourhood, the

local authority has power to apply to the Court for an order requiring the "owner" either to repair and restore the structure or to demolish it. "Owner" is defined in section 343 as "the person receiving the rack rent of the premises in connection with which the word is used . . . or who would so receive the same if those premises were let at a rack rent". Where the wall is owned by two persons in severalty either by Conveyance or under L. P. A., the order will presumably be made against both owners. What will happen if one co-owner elects to repair, the other to demolish? In the case of a wall in Class 2, each owner would clearly have to pay half (this is the only back-door remedy for a Class 2 owner); but in Class 3 the single owner would have to pay the whole unless he elects to demolish. If he does, it would seem that the owner of the dominant tenement would have no rights against him, and the easement would simply come to an end, unless it could be argued that in so electing he had committed some positive act in derogation from his grant.

Finally, the position of a tenant for a term of years at a rack rent on a full repairing lease requires consideration. Under L. P. A., 1925, s. 62 (1) "a conveyance of land shall be deemed to include and . . . shall operate to convey all buildings, erections, . . . fences, . . . liberties, privileges, easements, rights and advantages whatsoever, appertaining or reputed to appertain to the land"; and section 205 (1) (ii) defines "conveyance" as including (*inter alia*) a lease. This would patently pass to the tenant the landlord's rights in the case of Class 2, 3 and 4 walls. "Owner" is not defined in L. P. A. Is the direction that the "ownership" shall be severed vertically and that the respective "owners" shall have rights of support and user to be read as being applicable also to limited owners? Presumably so. The tenant can in that event enforce his easement against his neighbour and his neighbour can enforce it against the tenant. But in the event of the servient tenement crumbling away in the normal course of nature and causing damage to the demised premises, how does the tenant stand on his repairing covenant? It is considered that under a full repairing lease the landlord can make his tenant repair at any rate his half of walls included in both the old and the new Class 4; and if that entails mending both halves without contribution, then the tenant must presumably mend both halves without contribution. It should be noted that the rule that the owner of a servient tenement is not liable to repair for the benefit of the owner of the dominant tenement applies equally between landlord and tenant as between strangers. Where the demised premises depend for their support upon premises retained by the landlord, an easement of

support will be implied; but the landlord need not keep his adjoining property in repair for the benefit of his tenant, and if his building capsizes bringing the tenant's down with it, he will not be liable (*Colebeck* v. *Girdlers' Co.*, *supra*). If the tenant is on a full repairing lease it would seem that even in such a case he could compel the tenant to rebuild. What happens if the landlord has to pull down the adjoining premises under a Demolition Order is not (says *Hill & Redman: Law of Landlord & Tenant*, 10th ed., p. 111) clear. In the case of a wall under Class 3—belonging entirely to the adjoining owner—the tenant will get the benefit of the easement, but neither the landlord nor the tenant is under any *prima facie* liability to the other to effect repairs. If the wall falls down it would seem to be the tenant's misfortune if he wants it up, and he will have to arrange for its re-erection at his own expense; or the tenant can let it lie, in which case the landlord would have to arrange for repair if he wished to avoid further damage to his reversion. But the tenant will have to be careful about the wall of Class 2. If, where there is no express or prescriptive right of support the adjoining owner pulls down his house, or in any event, if that house crumbles away, and as a result the demised premises capsize, he will presumably have to rebuild them himself.

The situation outlined in this paper does NOT, however, obtain in the County of London, where the rights and remedies of those interested in party structures are exhaustively defined in Part VI of the London Building Acts Amendment Act, 1939 (*q.v.*).

THE RIGHTS AND DUTIES OF RIPARIAN OWNERS

By J. F. Garner, LL.M., Solicitor

The interesting article published in this Journal at p. 154, *ante* (*a*), and a recent case in the King's Bench Division, has suggested that the legal position of owners of land bordering on watercourses would repay further investigation. It is proposed first to deal with the common law, in connection with natural and artificial watercourses respectively, and then with the statutory provisions affecting the subject.

(A) *Natural watercourses.*

The "natural" rights of riparian owners in respect of natural watercourses are well established as a result of decided cases, and as Mr. Brett has discussed the additional rights that may be acquired in respect thereof by way of easements (*b*), it is proposed to confine our discussion to the duties and obligations, as distinct from the rights, of riparian owners. It should be noted in passing, however, that although the lower riparian owner will have a right of action if the higher owner obstructs, diminishes or pollutes the flow of the natural stream improperly, it has never been suggested that such lower riparian owner has any right of "self-help" (apart from grant, express or implied); *i.e.*, he cannot enter on the land of the higher owner without consent in order to clear the obstruction in the stream or otherwise to enforce his natural rights.

So far as the duties of a riparian owner are concerned, in respect of a natural stream he is under a duty (the correlative of the rights of the riparian owner lower down the stream) not to obstruct (*c*) or divert the course of the stream, or by some positive action to cause it to flood his neighbour's land (*d*), or to pollute it (*e*), or to abstract an abnormal quantity of water

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(*a*) "The right to take flowing water", by Peter Brett, LL.B., in the issue for June, 1950.

(*b*) See the summary in his article, at p. 159.

(*c*) A public authority is in no special position in this respect (apart from express statutory authority): *Provender Millers, Ltd.* v. *Southampton C. C.*, [1939] 4 All E. R. 157.

(*d*) *Courtney* v. *Collet* (1697), 1 Ld. Raym. 272.

(*e*) See, *e.g.*, *Jones* v. *Llanrwst U. D. C.*, [1911] 1 Ch. 393.

therefrom (*f*). These duties are confined, however, to positive acts on the part of the riparian owner concerned (*g*). He is not, for example, obliged to clear an obstruction arising in the stream from natural causes (*h*). In the recent case of *Neath R. D. C.* v. *Williams* (*i*), Lord Goddard, C.J., at p. 629 said, (referring to the remarks of Blackburn, J., in *Hodgson* v. *York Corporation* (*k*)), "there is a clear expression of opinion by a judge of the highest eminence that the owner of the bed of a stream is not under any obligation at common law to remedy the natural and gradual silting up of the stream, and there is no difference, in my opinion, whether the silting up is caused in one way or in another". This immunity from any obligation applies whether the effect of nature has been to cause a nuisance on the land of the lower riparian owner (*e.g.*, by flooding the complainant's land or buildings, as in *Neath R. D. C.* v. *Williams*), or whether it has merely resulted in an interference with his natural rights.

If the obstruction to the natural stream were caused on the defendant's land by some act other than by a natural agency, it seems that the defendant will be liable in respect thereof; thus, in *Bell* v. *Twentyman* (*l*), a higher riparian owner was held responsible for an obstruction caused by the fall of a ruinous wall into the stream, and the fact that the defendant's tenant had defaulted in a contractual duty to keep the wall in repair was held to be no answer to the plaintiff's action. On the other hand, in a complaint of flooding from the defendant's land to the land of the plaintiff, it appears that the defendant will be liable (apart from easements) only where he has wilfully or negligently caused the flooding. Thus, where the defendant had constructed a protecting wall, in respect of which he was under no duty to the plaintiff to erect, which prevented flooding on the plaintiff's land, and then he made breaches in this wall, as a consequence whereof the plaintiff's wall was flooded, it was held that the plaintiff had no cause of action against the defendant: "I can find nothing which affords support for the proposition that, where the riparian owner of land on a non-tidal river erects a wall for his own purposes for the protection of his own land, a person owning land

(*f*) See Mr. Brett's article cited *supra*, for comment on what may be considered to be an "abnormal quantity" in this context.

(*g*) The positive act may be comparatively remote from the cause of the complaint: *Margate Pier & Harbour Co.* v. *Margate Town Council* (1869), 20 L. J. Ch. 564.

(*h*) *Hodgson* v. *York Corporation* (1873), 28 L. T. 836.

(*i*) [1950] 2 All E. R. 625.

(*k*) *Supra*, note (*h*).

(*l*) (1841), 1 Q. B. 766; actually it is not clear from the reports of the case whether the watercourse in question was natural or artificial.

behind him is entitled to require that he shall never thereafter remove it, or any part of it " (*m*). On the other hand, in certain circumstances, a riparian owner may be under a duty to prevent a stream flowing through his land from flooding, or to scour out or otherwise cleanse a natural stream, *e.g.*, as a consequence of an easement or under some special statutory provision (*n*).

(B) *Artificial watercourses.*

In this branch of the law, the distinction between what is natural and what is artificial is fundamental; " the right to the flow of water along an artificial watercourse depends on entirely different principles; it is not enjoyed of common right as incident to the ownership of the land through which the water flows, but is an easement arising by grant or prescription " (*o*). No natural rights can subsist in connection with an artificial watercourse, and such rights and duties as may apply to the respective riparian owners must be the result of agreement, grant or a prescriptive easement.

The normal rules apply to the creation of easements in connection with artificial watercourses, but the intention of the person responsible for the construction of the particular watercourse must be carefully examined, for if the watercourse had been intended to be temporary only, it would not normally be possible for a lower riparian owner to be able to claim a prescriptive easement for the continuance of the flow of water over his land (*p*), but each case must be considered on its own particular facts (*q*).

Apart from express grants, it is often peculiarly difficult to establish whether in a particular case an easement has been acquired in respect of an artificial watercourse. Moreover, as was pointed out by Bowen, L.J. (*r*), there may be two kinds of rights claimed, the one where the dominant owner is claiming a right to conduct a watercourse across another man's land onto his own, and the other where he claims a right to continue the enjoyment on his land of the discharge thereon of an artificial flow of water

(*m*) *Per* Sir Wilfrid Greene, M.R. (as he then was), in *Thomas & Evans* v. *Mid-Rhondda Co-operative Society, Ltd.*, [1940] 4 All E. R. 357, at p. 366.

(*n*) See, *e.g.*, *Geddis* v. *Proprietors of Bann Reservoir* (1878), 3 App. Cas. 430.

(*o*) *Williams on Vendor and Purchaser*, 4th ed., at p. 465, and compare Sir Montagu Smith in *Rameshur Naryan Singh* v. *Koonj Pattuk* ((1878), 4 App. Cas. 126), where he observed that in the case of an artificial watercourse, " any right to the flow of water must rest on some grant or agreement, either proved or presumed, from or with the owners of the lands from which the water is artificially brought or on some other legal origin ".

(*p*) *Wood* v. *Waud* (1849), 3 Exch. 748; *Bailey* v. *Clark*, [1902] 1 Ch. 649.

(*q*) See, *e.g.*, *Schwann* v. *Cotton*, [1916] 2 Ch. 459; and *Bartlett* v. *Tottenham*, [1932] 1 Ch. 114.

(*r*) In *Chamber Colliery Co.* v. *Hopwood* (1886), 32 Ch. D. 549.

from a watercourse constructed by some other person. The latter case in particular " is a very difficult kind of right to establish. The mere discharge of water by an upper proprietor upon the land of a lower may establish a right on the part of the upper proprietor to go on discharging, because so long as the discharge continues there is submission on the part of the lower proprietor to proceedings which indicate a claim of right on the part of the proprietor above, but it is difficult for the lower proprietor to establish a right to have the flow continued, just as it would be very difficult to make out that because for twenty years my pipe has dripped onto a neighbour's land, therefore he has a right at the end of twenty years to say my pipe must go on leaking " (*s*).

Once an easement has been established in respect of an artificial watercourse, either by express grant or by prescription (*t*), it is recognised that as a necessary incident thereof (whether expressly mentioned in any grant or not), the owner of the dominant tenement must have the right to carry out any acts essential for the purpose of securing the enjoyment of his easement, including the right to enter the land of the servient owner : " if a man gives me a licence to lay pipes of lead in his land to convey water to my cistern, I may afterwards enter and dig the land to mend the pipes, though the soil belongs to another and not to me " (*u*).

This right to carry out repairs on another's land vested in the dominant owner does not imply that the servient owner, on whose land the repairs may be carried out, is under a duty (unless the terms of the easement expressly so provide) to clear out a stream that has become silted up or otherwise obstructed, through no fault of his own, for the benefit of the dominant owner. As a general rule, the servient owner is not obliged to " execute any repairs necessary to ensure the enjoyment or convenient enjoyment of the easement by the owner of the dominant tenement " (*a*). " Fault ", however, which results in damage to the dominant owner as a consequence of obstruction, pollution, etc., will comparatively readily be imputed by the Courts to a servient owner, and render him liable in an action at the suit of the dominant owner.

Thus, in *Sedleigh-Denfield* v. *St. Joseph's College* (*b*), it was

(*s*) *Ibid.*

(*t*) Apparently this principle applies to both the types of easement mentioned by Bowen, L.J., *supra.*

(*u*) *Pomfret* v. *Ricroft* (1669), 1 Saund. 321, *per* Twysden, J.

(*a*) *Per* Parker, J., in *Jones* v. *Pritchard*, [1908] 1 Ch. 638; it seems, therefore, that if the watercourse in *Neath R. D. C.* v. *Williams* (*supra*) had been artificial, the decision of the Court would have been the same, assuming that no fault could have been imputed to the defendant.

(*b*) [1940] A. C. 880.

held by the House of Lords that a servient owner was liable for damage caused even by the act of a trespasser, where the defendant had "continued or adopted" the nuisance. Viscount Maugham observed (at p. 358), "in my opinion an occupier of land 'continues' a nuisance if, with knowledge or presumed knowledge of its existence, he fails to take any reasonable means to bring it to an end, though with ample time to do so. He 'adopts' it if he makes any use of the erection, building, bank or artificial contrivance which constitutes the nuisance", and Lord Atkin observed (*ibid.*, at p. 360), "It seems to me clear that, if a man permits an offensive thing on his premises to continue to offend—that is, if he knows that he is operating offensively, is able to prevent it, and omits to prevent it—he is permitting the nuisance to continue". Even so long ago as 1841 (*c*), it had been held that the default of a tenant in failing to keep a wall in repair that had become ruinous and had blocked a stream, the benefit to which the plaintiff was entitled, was no answer in an action of nuisance. In the well-known case of *Job Edwards, Ltd.* v. *Birmingham Navigations* (*d*), it had been held (*per* Scrutton, L.J.,) that "the landowner in possession is liable for a nuisance created by a trespasser which causes damage to others, if he could, after he knows or ought to have known of it, prevent by reasonable care, its spreading".

On the other hand, if an easement to conduct water across another's land is improperly used (*e.g.*, if the watercourse is not confined within its prescribed channels, or if the pipes through which the flow is conveyed are allowed to leak owing to faulty workmanship or want of repair), and damage is occasioned thereby to the servient owner, the dominant owner may be liable in respect thereof. This is sometimes expressed as an obligation on the dominant owner to keep his watercourse in repair, but this seems to be incorrect. Thus, in *Jones* v. *Pritchard* (*e*), it was said, "if the easement be to take water in pipes across another man's land and pipes are laid by the owner of the dominant tenement and fall into disrepair, so that water escapes onto the servient tenement, the owner of the dominant tenement will be liable for damage done by such water. Strictly speaking, I do not think that even in this case the dominant owner can be said to be under a duty to repair. I think the true position is that he cannot under the circumstances mentioned plead the easement as justifying what would otherwise be trespass, because

(*c*) In *Bell* v. *Twentyman* (1841), 1 Q. B. 766.
(*d*) [1924] 1 K. B. 341.
(*e*) [1908] 1 Ch. 638, *per* Parker, J.

the easement is not, in fact, being fairly or properly exercised". A dominant owner may similarly be liable for damage caused, as a consequence of his enjoyment of his easement, to a third party—even towards a person entitled only to a similar easement in adjoining land (*f*).

(C) *Statutory provisions.*

The statutory provisions varying the common law on the topics above discussed are as follows :—

(i) *Land Drainage Act, 1930.*

Where a watercourse (*g*) is situate within the area of a land drainage board (*h*), the person having control of the watercourse, or, if that person is not known, the person occupying the land through which the watercourse passes, is under a duty, where the watercourse "is in such a condition that the proper flow of water is impeded", to put the watercourse in proper order, if agricultural land belonging to or in the occupation of some other person is injured by water or is in danger of being so injured (*i*). This duty is enforceable at the instance of the drainage board for the district (*k*), by the service of a notice requiring the necessary works to be executed; if this is not complied with, the board are empowered to enter and execute the works themselves, and to recover their reasonable expenses in so doing from the person in default (*l*). This is a useful section, and imposes duties unknown to the common law, but it is limited in its operation.

By section 44 of the Land Drainage Act, 1930, it is made unlawful for any person to construct an artificial obstruction in a watercourse (*m*), of a nature similar to a mill, dam or weir. Further, under section 57 of the same Act, the owner or occupier of land (*n*) which has sustained injury by reason of the neglect

(*f*) See, *e.g.*, *Charing Cross Electricity Supply Co.* v. *Hydraulic Power Co.*, [1914] 3 K. B. 772.

(*g*) "Watercourse" is defined by section 81 of the Act to include "all rivers, streams, ditches, drains, cuts, culverts, dykes, sluices, sewers (other than sewers under the control of a local authority within the meaning of the Public Health Act, 1875 [which would now be termed 'public sewers' under section 20 (2) of the Public Health Act, 1936] and passages through which water flows". In section 35 of the Act, however, the term does not include the main river of a catchment area (see section 35 (14)).

(*h*) In many cases, the functions of the land drainage board will now be carried out by the "river board", constituted under the River Boards Act, 1948. That statute, however, does not make any major changes in the substantive law of the Act of 1930.

(*i*) Land Drainage Act, 1930, s. 35 (1).

(*k*) Probably now the river board; see note (*h*), *supra*.

(*l*) Act of 1930, ss. 35 (2)–(10).

(*m*) See note (*g*), *supra*.

(*n*) By section 81 of the Act, "land" is defined to include "water and any interests in land or water and any easement or right in, to, or over land or water",

of the occupier of any other land to keep a watercourse (*m*) in order, as therein mentioned, may serve a notice on such occupier requiring him to maintain the banks, or to cleanse or scour the channels of the watercourse, etc. This section in effect "gives a new remedy, a statutory remedy, and a statutory cause of action, to an adjoining landowner, first enabling him to serve a notice calling on a person to do something which he otherwise was not under a liability at common law to do, and, if he neglects to do it, the person serving the notice can do it himself and recover the expense. . . . The obligation seems to me to arise only where the notice has been served, and there has been a failure to comply with it" (*o*).

Similarly, the Act of 1930 operates in another way, not only imposing duties unknown to the common law, but also conferring special powers on any "person interested in land", who desires to effect works of improvement on his land, to construct necessary drainage works on another person's land. By section 59, any such person may be authorised by the Minister of Agriculture and Fisheries to execute such works, at his own expense.

(ii) *Rivers Pollution Prevention Act, 1876.*

As above explained, one riparian owner, as against another riparian owner higher up the stream, will normally be entitled to an uninterrupted and unpolluted flow of water. Provided no public nuisance is thereby occasioned (*p*), however, one riparian owner may acquire against another a right to pollute the stream (*q*).

Even in Victorian days, when the principles of public health were not appreciated to the extent that they are today, it was realised that this common law principle gave too great a measure of personal freedom to riparian owners—the "right to pollute" cannot be allowed to be exercised too freely. The above Act of 1876, unsatisfactory as it is to modern standards in many respects (*r*), was therefore passed to control this right. The Act made it an "offence", capable of being restrained by an

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and it seems, therefore, that the section would be wide enough to cover a mill wheel (in *Finch* v. *Bannister*, [1908] 2 K. B. 441, it was held that a similar provision in the Land Drainage Act, 1847, was not wide enough to include such an object, as there was no extended definition of the term "land" applicable to the 1847 Act).

(*o*) *Per* Lord Goddard, C.J., in *Neath R. D. C.* v. *Williams*, *supra*, at p. 630.

(*p*) There can be no prescriptive right to cause a public nuisance: *R.* v. *Cross* (1812), 3 Camp. 224, and *Att.-Gen.* v. *Barnsley Corporation*, [1874] W. N. 37.

(*q*) *Wright* v. *Williams* (1836), 1 M. & W. 77.

(*r*) See, *e.g.*, the Report, published in 1949, of the Rivers Pollution Prevention Sub-Committee of the Central Advisory Water Committee.

injunction issued by the local county court, at the instance of the appropriate local authority (*s*), to discharge or cause to flow, etc., into any stream (*t*) any solid refuse (*u*), solid or liquid sewage matter (*a*), or any "poisonous, noxious or polluting liquid proceeding from any factory or manufacturing process" (*b*). There is a wealth of case law on the complicated provisions of this statute, into which it is beyond the province of this article to inquire.

(iii) *Public Health Act, 1936.*

Under section 259 of this Act, the procedure for the abatement of a statutory nuisance, which may be invoked at the instance of the local sanitary authority (*c*), is applied to (*inter alia*) "any . . . watercourse (*d*) which is so foul or in such a state as to be prejudicial to health or a nuisance", and to "any part of a watercourse, not being a part ordinarily navigated by vessels employed in the carriage of goods by water, which is so choked or silted up as to obstruct or impede the proper flow of water and thereby to cause a nuisance, or give rise to conditions prejudicial to health". It is important to notice, however, that proceedings under the section can be taken only against the person "by whose act or default the nuisance arises or continues". In *Neath R. D. C.* v. *Williams* (*supra*), it was held that this proviso imported the terms of the common law, and that where the defendant could not be compelled at common law (at the suit of any person) to take remedial action in respect of the nuisance complained of, and where the above provisions of the Land Drainage Act, 1930, could not have been invoked against him, he could not be held liable under the present section. The watercourse in this case was a natural one, but it is submitted that the reasoning adopted by the Court would apply equally to artificial watercourses, and that the principles applicable thereto,

(*s*) Under the 1876 Act itself, this expression meant the local county borough or county district council, but the enforcing authority will now be the river board, where one has been constituted (River Boards Act, 1948, s. 4).

(*t*) This term is defined by section 20 of the 1876 Act, to include "the sea to such extent, and tidal waters to such point as may, after local inquiry and on sanitary grounds, be determined by the Minister of Health by order published in the London Gazette. Save as aforesaid, it includes rivers, streams, canals, lakes and watercourses, other than watercourses at the passing of this Act mainly used as sewers, and emptying directly into the sea or tidal waters which have not been determined to be streams within the meaning of this Act by such order as aforesaid"; and see also section 55 (2) of the Salmon and Freshwater Fisheries Act, 1923.

(*u*) 1876 Act, s. 2.

(*a*) *Ibid.*, s. 3; the expression is not defined in the Act.

(*b*) *Ibid.*, s. 4.

(*c*) See sections 92–100 of this Act.

(*d*) The expression is not defined for the purposes of this Act.

as discussed above, would also apply to cases under the present section.

(D) *Conclusion.*

To sum up, the principles herein discussed may be re-stated as follows :—

(a) A riparian owner is not (apart from any express easement to the contrary) under any obligation to cleanse or scour out, etc., a natural or artificial watercourse which has become silted up from natural causes, although in the case of an artificial watercourse the Courts will hold such an an owner liable for the acts of a third party of which he was, or ought to have been aware.

(b) The owner of the dominant tenement has a right to maintain an artificial watercourse, in order that he may enjoy the benefit of his easement in respect thereof, and may enter the land of the servient owner for that purpose, but in certain circumstances he may be liable for damage if he fails to execute necessary repairs.

(c) Special duties of maintenance of a watercourse are in certain circumstances imposed on a riparian owner under the Land Drainage Act, 1930.

(d) No easement can be acquired which could legalise a public nuisance, or contravene the provisions of the Rivers Pollution Prevention Act, 1876 (*e*).

(e) The Public Health Act, 1936, provides a special summary (and very effective, where applicable) procedure by which a nuisance arising in a watercourse may be abated, but this remedy can be invoked only against a riparian owner or other person who is already under a statutory or common law obligation in respect thereof.

(*e*) The leading case on the 1876 Act in this connection is now *George Legge & Son* v. *Wenlock Corporation*, [1938] A. C. 204.

APPLICATION OF ASSETS: THE LIABILITY OF REALTY

By Spencer G. Maurice, Barrister-at-Law

Section 34 (3) of the Administration of Estates Act, 1925, provides that: " Where the estate of a deceased person is solvent his real and personal estate shall . . . be applicable towards the discharge of the funeral, testamentary and administration expenses, debts and liabilities payable thereout in the order mentioned in Part II of the First Schedule to this Act ". On reference to Part II of Schedule I it is seen that resort is to be had in the first place to property of the deceased undisposed of by will, subject to the retention thereout of a fund sufficient to meet any pecuniary legacies; then (para. 2) to " Property of the deceased not specifically devised or bequeathed but included (either by a specific or general description) in a residuary gift, subject to the retention out of such property of a fund sufficient to meet any pecuniary legacies, so far as not provided for as aforesaid ". By para. 8 (*a*) it is provided that: " The order of application may be varied by the will of the deceased ". *Prima facie*, and subject to para. 8 (*a*), para. 2 seems to make realty and personalty equally liable, not only for the payment of expenses and debts, but also for the satisfaction of pecuniary legacies. A study of the cases, both before and after the Act, shows that this is not in fact so.

The law has always viewed realty and personalty with a different eye. The reason for this difference of view in the case of a will finds expression in the judgment of Lord Cottenham, L.C., in *Mire-house* v. *Scaife* (1837), 2 My. & Cr. 695, where that learned Lord Chancellor, describing the difference between a gift of personalty and a gift of real estate, said (at p. 706): " When a testator gives the residue of his personal estate, he knows that it will be uncertain, till his death, what will be comprised in that gift. But it is certain that the gift will operate upon part only of what he may be possessed of at his death, all debts, funeral expenses, and other charges being to be paid out of it; and the expression necessarily imports what will remain, after all charges are defrayed. On the other hand, the testator knows precisely upon what real estate such a gift will operate, unless there be charges affecting the land beyond what the personal estate can satisfy ".

That case was heard just before the Wills Act, 1837, came into force. Prior to the Wills Act all devises of realty were specific: that is to say, a residuary devise included neither land acquired by the testator after the date of his will, nor land the devise of which by the will failed by lapse or otherwise. Section 24 of the Wills Act provided, however, that, with reference to the real as well as to the personal estate comprised in it, a will should be construed as if executed immediately before the death of the testator, unless a contrary intention should appear by the will. Section 25 provided that a residuary devise should include estates comprised in lapsed and void devises. Nevertheless, in *Hensman* v. *Fryer* (1867), L. R. 3 Ch. 420, Lord Chelmsford, L.C., decided that, in spite of the Wills Act, a residuary devise of realty was specific, and he referred to *Mirehouse* v. *Scaife*. In *Lancefield* v. *Iggulden* (1874), L. R. 10 Ch. 136, 141, Lord Cairns, L.C. (with whom James, L.J., agreed), came to the conclusion that there was nothing in the Wills Act "... To alter the well-settled rule of law as to the effect of a residuary devise when you know the time at which it was made, namely, that for the purpose of payment of debts it is to rank *pari passu* with the specific devises". He considered that *Hensman* v. *Fryer* was a direct decision on this point.

In *Elliott* v. *Dearsley* (1880), 16 Ch. D. 322, the Court of Appeal held that legacies were chargeable on real estate, but only in aid of the personalty, and that the realty and the personalty were only to be resorted to *pro rata* when the testator had expressly directed payments to be made out of a mixed fund. This principle was applied by North, J., in *Re Boards, Knight* v. *Knight*, [1895] 1 Ch. 499.

So much for the cases decided before the Administration of Estates Act, 1925. At this point it may be remarked that there is a curious disagreement between the textbook writers on the subject of residuary devises. On the authority of *Hensman* v. *Fryer* and *Lancefield* v. *Iggulden*, the learned editor of *Theobald on Wills*, 10th ed., states (at p. 116) that: "A devise of lands, whether by specific description or by residuary devise, is specific". In *Jarman on Wills*, 7th ed., on the other hand, it is stated (vol. 2, at p. 916) that to say that a general or residuary devise is specific "is a loose and inaccurate way of stating the law", and, a little further on: "... All that is meant is that, for the purpose of the payment of the debts of a testator, his specific and residuary devises ranked *pari passu*, prior to the Administration of Estates Act, 1925". It is submitted with respect that the statement in *Theobald on Wills* is hard to justify, in view of the wording of Sch. I, Pt. II, para. 2 of the Administration of Estates Act.

Yet the law has not been altered in all respects. This was made clear by Clauson, J., who said, in *Re Thompson, Public Trustee* v. *Husband*, [1936] Ch. 676, 682 : " It is suggested that the effect of [Sch. I, Pt. II, para. 2] is to alter the law, and to provide that the fund which is to be retained out of residuary realty and personalty in order to meet pecuniary legacies is to be retained in the following way : that a proportionate part is to be retained out of realty and personalty *pro rata* of the amount of the realty and personalty respectively. The provision does not say so, and the provision is not concerned with any such matter. The provision is concerned with the way in which funeral, testamentary and administration expenses, debts and liabilities are to be met. There is no indication there that there is any intention of altering the law in respect of the rights of the legatees as against those interested in the residuary personalty and residuary real estate, or in respect of the rights *inter se* of those interested in the residuary realty and personalty respectively, as regards bearing the charge of legacies, and I can see no foundation for the suggestion that that provision has in any way altered the law as laid down in *Re Boards* ".

Exactly how the Schedule was meant to work was explained by Uthwatt, J., in *Re Anstead, Gurney* v. *Anstead*, [1943] Ch. 161. His Lordship held that the first step in administering a solvent estate was to set aside out of residue a fund to satisfy the pecuniary legacies. Following *Re Thompson*, he held that this first charge fell primarily on residuary personalty rather than residuary realty. The result of this was notionally to divide the residue into two separate funds. The first fund was to be used to meet pecuniary legacies. The second consisted of the balance of the residue, including residuary real estate. Debts and testamentary expenses must be paid out of this second fund, and resort was to be had to the first fund to pay such liabilities only when the second was exhausted.

The learned editor of *Theobald on Wills*, 10th ed., says (at p. 171) : " It is not always easy to determine whether a devise is residuary or not ". A doubtful case was considered recently in *Re Ridley, Nicholson* v. *Nicholson and Another*, [1950] 2 All E. R. 1. The testatrix died in 1948 and left a considerable estate. She gave a number of specific legacies free of duty, and then gave the residue of her personal chattels to the first defendant. She made a devise of " all my real estate ", free of duty. She gave a number of pecuniary legacies, some free of duty and some not. Finally she gave " the residue of my property " to the first defendant.

It will be observed that not only were the pecuniary legacies made payable out of the personal estate alone, but that the duties

on the realty—which would normally be paid out of the realty—were likewise cast upon the personalty. In the result the pecuniary and specific legacies, added to the debts and death duties, more than exhausted the personal estate. It was argued that, having regard to the Administration of Estates Act, the primary fund for the payment of the testamentary expenses (but not the legacies) was the realty and personalty not specifically devised and bequeathed. If the First Schedule to the Act was to be applied in the manner explained in *Re Anstead*, and if the gift of realty referred to above was to be taken as a residuary devise, then the result would be that it would rank with the residuary gift of personalty, and, consequently, about half of the estate duty on the personalty would fall on the realty.

This result would clearly be contrary to the intentions of the testatrix, whose calculations were undoubtedly upset by what Harman, J., referred to as "the magnitude of the exactions of the State". It thus became material to consider whether the gift of realty made by the testatrix was in fact a residuary gift, and, if it was, whether a residuary gift of realty was or was not still to be considered as specific.

Harman, J., gave it as his opinion that the gift of realty, though in the form of a general devise of realty, was not a residuary gift. In formulating this opinion, his Lordship was clearly influenced by the fact that the expression used by the testatrix was "all my real estate"—not "the rest of my real estate" or "my other real estate"—and that by a later clause in the will she gave what she called "the residue of my property": that, said his Lordship, was a true residuary clause which would sweep up realty as well as personalty if any were undisposed of. Furthermore, his Lordship found himself able to apply a *dictum* of Farwell, J., in *Re Rowe*, *Bennetts* v. *Eddy*, [1941] Ch. 343, where that learned Judge had to construe a clause in which the testator said "I devise all my real estate and bequeath all the residue of my personal estate to [two named persons] in equal shares", and, applying *Re Thompson*, decided that the real estate was devised as a specific devise to the named persons, the residue given being the residue of the personal estate. Having decided that the gift of realty in *Re Ridley* was not a residuary gift, it was unnecessary for Harman, J., to decide whether a residuary devise of realty was or was not specific.

Although Harman, J., expressed himself prepared to hold that the gift of realty was, on the true construction of the will in *Re Ridley*, not a residuary gift, he also came to the conclusion that this was a case where the usual order of application of assets was varied by the will of the testatrix, within the meaning of Sch. I,

Pt. II, para. 8 (*a*) of the Administration of Estates Act, and on this he based his decision. He said ([1950] 2 All E. R. 4): " I think that a will which gives the realty by a general devise of this sort, which is not on the face of it residuary and expressly throws the duty in respect of that realty on to the personalty, is followed by a gift of legacies, and followed again by what is obviously a true residuary clause, shows an intention that the legacies and also the expenses shall not come on to the realty until the personalty is exhausted. That seems to me to be, as a mere matter of construction, the inevitable result of the way in which the testatrix has made her will ". In the result, therefore, since the pecuniary and specific legacies added to the debts and death duties on both realty and personalty more than exhausted the personal estate, the pecuniary legacies had to abate to some extent, so that the pecuniary legatees lost part of their legacies owing to " the magnitude of the exactions of the State ".

NOTES OF RECENT CASES

1. *LAW OF PROPERTY AND CONVEYANCING*

By S. M. Tolson, Barrister-at-Law

Easement—implied reservation in a lease—advertisement on an outer wall.—The anomalous case of *Simpson* v. *Weber*, 183 L. T. 47, has been strengthened by a recent decision, *Re Webb*, [1950] 2 All E. R. 828, so that it appears that there is now some truth in saying that the law of implied reservation of easements has received a certain amount of extension. In the former case, Salter and Fraser, JJ., held that a creeper and a gatepost which were secured to the plaintiff's premises at the time of the severance of the property could remain there under easements impliedly reserved provided "that there was no evidence that it was not the intention of the parties that" they "should stay". In *Re Webb* (*supra*), there was a lease for 21 years of two upper floors of a house, which Danckwerts, J., held impliedly included a demise of the outside walls surrounding the leased premises. On one of these walls were two large advertisements belonging to the landlord, one of them advertising his goods, which had been there during a previous lease to the tenant, and which the tenant now claimed should be removed as there was no express reservation with regard to them in the lease. The landlord retained the ground floor and carried on a butcher's business therein. Danckwerts, J., held that the right could only be implied, if at all, from the situation as it existed when the lease was entered into. He applied *Simpson* v. *Weber* (*supra*), noting that that case went further in favour of an implied reservation than any other case he knew, and restated Salter, J.'s, dictum in the positive form that "one should be able to find that there was an intention that" the objects "should remain in their original position". The learned judge recognised that this was an exceptional case such as was mentioned by Greer, L.J., in *Liddiard* v. *Waldron*, [1934] 1 K. B. at p. 447, and (presumably following *Corporation of London* v. *Riggs* (1880), 13 Ch. D. 798), the right was restricted solely to what it was at the date of the lease, so that the advertisements could not be changed or extended.

The question which seems to have been overlooked in arguing this case is, what is the dominant tenement, that is, can the grant of a right to advertise be an easement at all? As Byles, J., said in *Bailey* v. *Stephens* (1862), 12 C. B.(N.S.) 115, an easement "must have some *natural* connection with the estate as being for its benefit". *Simpson* v. *Weber* (*supra*) can be distinguished on this point. Grants of a right to advertise have besides in the past been treated as licenses. *King* v. *David Allen*, [1916] 2 A. C. 54; *Walton Harvey* v. *Walker*, [1931] 1 Ch. 154.

The result, apart from this difficulty, seems to be that any easement may be reserved by presumed intention at the date of the grant where it is common sense to imply one, and that such facts constitute the exceptional circumstances referred to by Greer, L.J., in *Liddiard* v. *Waldron* (*supra*).

Sale of land—time not initially of the essence of the contract —purchaser's request for delay—right to forfeit deposit and resell. —The problem of when time can become the essence of a contract arose recently in *Smith* v. *Hamilton*, [1950] 2 All E. R. 928. The contract was subject to the National Conditions of Sale (15th Edn.) so far as they were not inconsistent. The purchaser had difficulty in obtaining the balance of the purchase money, and the vendor's solicitors were informed that it would not be possible to complete the purchase on the date fixed by the contract. The vendor replied by notifying the purchaser that he would exercise his rights a fortnight from the date of his letter if she had not completed by then. This in fact happened, and on the date named he wrote declaring the deposit forfeit, and his agents re-sold the property a day or two after. The purchaser then offered to complete.

Harman, J., held that under the National Conditions of Sale, time was clearly not of the essence of the contract as regards completion, and that (following *Green* v. *Sevin*, 13 Ch. D. 599) the vendor could not make it so in the absence of sufficient impropriety on the part of the purchaser entitling him to rescind. The learned judge thought that the purchaser's letter was not such an impropriety (as it would have been if she had said, "Heaven knows when I shall complete"), but that even if it was, the vendor could not treat the contract as at an end so soon as two weeks after the original date fixed for completion, and therefore the resale and attempted forfeiture were wrongful.

Settlement—discretionary trust—"pay or apply" income to named class with contingent interest only in corpus—allocated sums not required for maintenance, direction to accumulate—section 31 Trustee Act, 1925.—In *Re Peel*, [1936] Ch. 161, a direction to pay or apply an annuity for the benefit of an infant child was held not to be fulfilled by directing an accumulation. This case was distinguished in *Re Vestey's Settlement*, [1950] 2 All E. R. 891, on appeal from Harman, J., where a very complicated settlement provided, *inter alia*, for the discretionary payment or application of the income of a fund to infants in a named class during a specified period. On the termination of the period the infants were entitled to a contingent interest only in the *corpus*. The trustees resolved on two occasions to allocate specified sums to the beneficiaries, and directed that as they were not needed for maintenance, they should be accumulated under section 31 of the Trustee Act, 1925.

While Jenkins, L.J., thought that such an exercise of the discretion was a "payment" within the meaning of the settlement, the Court of Appeal agreed that it was an "application" of the income. As the infants had otherwise no vested interest in the *corpus* of the fund or right to the income, distinguishing *Re Peel* (*supra*), the trustees had by exercise of their discretion vested the sums absolutely in them. Further, their act was not invalidated by their mistakenly thinking that the sums had thereby become subject to section 31 of the Trustee Act, 1925. This was the mechanical, but not the direct result of their act.

With regard to the word "payment", Jenkins, L.J., thought that a wider meaning should be given to it where a class of beneficiaries included infants, who of course, could not give a good receipt.

Shifting clause—validity—uncertainty.—"In these circumstances . . . it would not now be right for this court to hold that a time honoured clause, which has the authority of conveyancing text-books of the first rank, and has had such authority for a matter of more than eighty years and has been dealt with in this court on the footing that it is a valid clause, is, in truth, invalid . . .". The above words are from the judgment of Jenkins, L.J., in *Re Wilson's Will Trusts*, [1950] 2 All E. R. 955, in which the Court of Appeal refused to question the validity of a shifting clause, like that now in *Key & Elphinstone*, Vol. 2, 14th ed., at p. 736. The court was influenced by *Re Hinckes*, [1921] 1 Ch. 475, a case turning upon the construction of a similar clause where

the point was never in doubt (see Warrington, L.J., at p. 487), though such argument would have been greatly to the interest of one party.

In *Wilson's Case* it was held that the clause of defeasance being valid, in that particular case operated when the primary estate vested in possession, and not when the estate, the subject of the clause, also vested in possession.

Solicitor's lien on title deeds—retention on behalf of a subsequent mortgagee—redemption by mortgagee—enforceability of lien.—" A solicitor acting for mortgagee as well as mortgagor in the preparation of a mortgage thereby loses his lien on the title deeds in his possession for costs due to him from the mortgagor, even though the costs were incurred prior to the mortgage and the title deeds never left the solicitor's office ". This is the headnote to *Re Nicholson* (1883), 53 L. J. Ch. 302, referred to by Vaisey, J., in *Barratt* v. *Gough-Thomas*, [1945] 2 All E. R. 414 (noted in Vol. 10 N. S., pp. 96 and 164), which has finally come up for review on the merits of the case before the Court of Appeal, [1950] 2 All E. R. 1048. A previous appeal (62 T. L. R. 41) had been decided on other grounds.

The defendant, a solicitor, who had been acting first for the plaintiff, the mortgagor, and then for the mortgagee, claimed a lien over the title deeds for costs owing to him from the plaintiff. The plaintiff commenced redemption proceedings against the mortgagee's executors, one of whom was the defendant. Subsequent to the appeal the defendent took a transfer of the mortgage to himself alone and took out a summons in the proceedings for a declaration as to his right to a lien. It was open to the Court of Appeal to decide the matter as a question of principle, and they agreed with Vaisey, J.'s, reasoning (*supra*) following *Re Nicholson* (*supra*) in preference to *Re Messenger* (1876), 3 Ch. D. 317. " From the moment of the execution of the mortgage the defendant's retention of the documents of title must be exclusively referable to his agency for the mortgagee ".

Lien—jurisdiction of court to order sale where no right at common law—R. S. C. Ord. 50 *r.* 2.—An interesting point arose in *Larner* v. *Fawcett*, [1950] 2 All E. R. 727, namely whether the Court has power to order the sale of goods held on a purely

possessory lien where there is otherwise no right of sale. The respondent, the owner of a filly, appealed from an order of Danckwerts, J., contending that the Court had no power to order the sale of the filly which was in the applicant's possession. The applicant claimed a possessory lien over the filly for fodder, training and veterinary expenses.

The Court of Appeal held that the order was valid following *Bartholomew* v. *Freeman* (1878), 3 C. P. D. 316. Though Somervell, L.J., abstained from laying down any general principles, he decided that Order 50 r. 2 did give the court power to order sale where otherwise there was none and that following Sir William Page-Wood, V.-C., in *Thames Ironworks Co. Patent Derrick Co.* (1860), 1 John & H. 93, this case was one example where the law would not allow a mere right of retainer make the subject of a lien utterly useless to both parties. Their Lordships pointed out that in any event the respondent would not suffer, for under the order he could obtain the filly by paying a sum equivalent to her value into court.

Mortgage—person in occupation under an agreement with the mortgagor—need to join the occupier as a defendant to claim for possession by mortgagees—Order 55 Rule 5a.—Where a mortgagee is seeking possession of the mortgaged property against a mortgagor who has no statutory power of leasing and he discovers that the property is in the possession of another who claims to be in possession under a letting, notice must be given to such purported tenant in order that he may not lose his right to defend his interest if he can. This was decided by Wynn-Parry, J., in *Leicester Building Society* v. *Shearley*, [1950] 2 All E. R. 738, by analogy to *Minet* v. *Johnson* (1890), 63 L. T. 507. The learned Judge pointed out that this does not apply to every person found in possession (it would only cause unnecessary embarrassment to the mortgagee), but apparently only applies where there is a claim to a right which would otherwise go unheard and cause a miscarriage of justice.

Statutory nuisance—obstruction of natural watercourse causing flooding—not due to owner's neglect or default—Public Health Act, 1936, *s.* 93, *s.* 259 (b) *prov.*—In a case stated to the King's Bench Division (*Neath R. D. C.* v. *Williams and Another*, [1950] 2 All E. R. 625), Lord Goddard said, "the Common Law of England has never imposed liabilities on landowners for anything

which happens to their land in the natural course of affairs if their land is used naturally ". The Court decided that it was not a statutory nuisance under the Public Health Act, 1936, merely to " suffer " a *natural* watercourse to become obstructed by debris naturally brought down it, and thereby causing flooding and a nuisance. Mere sufferance, upon the interpretation of sections 93 and 256 (*b*) and the proviso thereto, had to be distinguished from an " act or default ".

It was also held that sections 35 and 57 of the Land Drainage Act, 1930, had no application in the particular case.

Disposition of entailed interest—" Devise Referring Specifically to the Property "—section 176 (1), *Law of Property Act*, 1925.—The disposition of an entailed interest by will under section 176 (1) of the Law of Property Act, 1925, has been questioned for the first time in *Re Manor Farm, Kytes Hardwick*, [1950] 2 All E. R. 572. A devise of " all my one-third share and all my other estate and interest " in a certain property was held by Vaisey, J., to pass the testator's interest as tenant-in-tail of two equal third shares as well as the remaining third share which he held in fee simple. The section requires a specific reference, but the learned Judge said that there was little difference between a reference and an allusion and applied the maxim *id certum est quod certum reddi potest.*

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2. *CHARITIES*

Promotion of industry, commerce and art—benefit to the community.—In *Crystal Palace Trustees* v. *Ministry of Town and Country Planning*, [1950] 2 All E. R. 857, the Crystal Palace Trustees appealed against a determination of the Minister that the Crystal Palace was not a charity. Danckwerts, J., held that the purposes of the Trust under the Crystal Palace Trust Act, 1914, for the promotion of industry, commerce and art were charitable as being for the benefit of the community within the fourth head under *Income Tax Commissioners* v. *Pemsel*, [1891] A. C. 531. The learned judge took the view that in *I.R.C.* v. *Yorkshire Agricultural Society*, [1928] 1 K. B. 611, the Court of Appeal had treated the promotion of agriculture as within this head and the distinguished *Oxford Group* v. *I.R.C.*, [1949] 2 All

E. R. 537, on the ground that in this case the clause objected to gave the trustees independent powers. In effect this case seems directly not to follow *Re Ogden*, 1909, 25 T. L. R. 382, where a trust "to encourage artistic pursuits or assist needy students in art" was held not to be charitable; and the learned judge justified his attitude partly by the decision in *Royal Choral Society* v. *I.R.C.*, [1943] 2 All E. R. 101 (noted in Vol. 8, p. 103), which, however, was based partly on educational grounds, and partly by reference to section 7 of the Mortmain and Charitable Uses Act, 1888.

In fact, however, the decision in this case does not seem to go far outside its peculiar facts. The learned judge took the view that the Crystal Palace Act, 1914, made it clear that the purposes for which the trustees were to carry it on were in essence charitable as for the benefit of the community by means of furthering industry, commerce and art. He did not find it necessary to say why these particular means of benefiting the community were charitable while others were not, because mere benefit to the community is not enough : *Re Strakosch*, [1949] Ch. 529; *Williams' Trustees* v. *I.R.C.*, [1947] A. C. 447.

Gift to hospital—testator's death after National Health Act—validity.—Re Glass' Will Trusts, [1950] 2 All E. R. 953 could only be distinguishable from *Re Morgan's Will Trusts*, [1950] 1 All E. R. 1097 (noted *ante*, p. 304) because in the latter case the gift was "for the benefit of" a hospital, while in the former it was a direct gift to the hospital. In both cases the will was made before and the testator died after the Act, but Vaisey, J., held that he would follow, as agreeing with, Roxburgh, J., in *Re Morgan* (*supra*) and held that a gift to the hospital did not fail. He directed that the money should be paid to the Regional Committee to be applied for the purposes of the particular hospital. It is respectfully suggested that these decisions must be considered as applicable only to charitable purposes, of which hospitals were one, and that it has not been seriously argued, though it has been held at first instance to have gone by default (see *Re Dean's Will Trusts*, [1950] 1 All E. R. 882), that nationalised hospitals are charities.

Relief of aged irrespective of poverty.—In *Re Glyn*, 66 T. L. R. (Pt. 2) 510, Danckwerts, J., held that the words "relief of aged,

impotent and poor " in the Statute of Elizabeth were to be read disjunctively and that it was not necessary to show poverty in a trust for the " aged ". Actually the case turned upon a trust for endowing free cottages for women of the working classes of sixty years and upwards. This the learned judge held had a sufficient context to show an intention to relieve indigent old people who by reason of age were no longer able to support themselves (dist. *Green & Sons* v. *Minister of Health*, [1947] 2 All E. R. 469, that " working classes " was no longer appropriate to modern social conditions). It should be noted that the Statute refers to " relief ", and since age cannot be cured it is submitted that the word must have some relation to the precariousness of their financial resources. A trust merely because it is intended to benefit aged persons would not, *probably*, be a good charitable trust. This matter may receive attention in the near future owing to the increasing need for homes for elderly people.

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3. *PLANNING CASES*

" *Curtilage* "—*area for assessment of development charge.*— The meaning of the word " curtilage " is of importance under the Town and Country Planning Act, 1947, because it may affect the question of whether or not there is change of user : *Sampson's Exors.* v. *Nottingham C.C.*, 1 P. & C. R. 1; and it may affect the question whether there is authority to extend development without express permission. In Scotland the point arose in connection with the area for assessment of development charge on a section analogous to section 70 of the English Act. Lord Mackintosh held that the development charge must be assessed in respect of the land belonging to the developer which might reasonably be regarded as being improved. He arrived at this view also by regarding what was comprised within the " curtilage " and cited Lord Halsbury in *Caledonian Ry.* v. *Turcan*, [1898] A. C. at p. 263, when the learned Lord Chancellor described a length of ground as a part of a building and being within its curtilage. Lord Mackintosh, therefore, said at p. 204 that " it is enough that it serves the purposes of the house or building in some necessary or reasonably useful way ". He also put it, " the curtilage area reasonably required for the comfortable enjoyment of the house ".

Pre-Act contravention—enforcement notice.—There has been considerable controversy over the question whether an enforcement notice could be issued in respect of a contravening use where it had commenced more than three years before the Appointed Day (July 1, 1948), owing to the ambiguity of section 75 (1) of the Act. This has now been discussed in two cases by Quarter Sessions presided over by well-known King's Counsel, and in the absence of authority in the Supreme Court these cases may be taken as a guide to the probable construction of the Act. In *Kendall* v. *Robinson*, 1 P. & C. R. 211, Lancashire Quarter Sessions Appeals Committee (Chairman, J. C. Jolly, K.C.) dismissed an appeal against an enforcement notice in respect of a contravening use commenced in 1944. The learned chairman said (at p. 216) that their construction of the Act was that an enforcement notice could be served in respect of developments commenced after the Appointed Day within four years of development, and in respect of developments commenced before the Appointed Day, within three years of the Appointed Day whenever they were commenced. In support of this liberal construction of section 75 the learned Chairman cited from a judgment of Denning, L.J., in *Seaford Court Estates* v. *Asher*, [1949] 2 K. B. 481, of which perhaps the most striking passage runs as follows: "He (the judge) must set to work on the constructive task of finding the intention of Parliament, and he must do that not only from the language of the statute but also from a consideration of the social conditions which gave rise to it, and of the remedy which it was passed to remedy; and then he must supplement the written word so as to give 'force and life' to the intention of the Legislation".

In this case the point was also taken that the enforcement notice did not refer to section 75. This contention was not successful, but it seems from the reasoning to be desirable in such a notice that section 75 should be mentioned.

The same conclusion concerning contravening uses before the Appointed Day appears to have been reached by the West Sussex Quarter Sessions (Chairman, A. M. Latter, K.C.) in *Stamps* v. *Bognor Regis U.D.C.*, 1 P. C. & R. 220, but it deals with an interesting argument that as the contravening use had already been carried on for four years it had, in fact, already complied with the Act and become a valid use. This argument was rejected. As the learned Chairman pointed out (at p. 222) the Act makes no such provision. Section 23 merely provides that an enforcement notice may be served within four years, but "it does not say 'after four years any development carried out during the war

period shall be treated for all purposes as complying with planning control ' ". This point is important because it will be remembered that apart from enforcement notice there is provision for the assessment of a penal development charge under section 74. This section contains no time limit and apart from any other remedy, which may or may not be available, it is at least arguable that a planning contravention is subject to a penal development charge irrespective of time limit.

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4. *WILL CASES*

By A. K. R. Kiralfy, Ph.D., LL.M., of Gray's Inn, Barrister-at-Law

Wills—statutory power to dispose of entails—sufficiency of reference—L. P. A., 1925, *s.* 176—*Acheson* v. *Russell* (1950), 2 T. L. R. 279; [1950] 2 All E. R. 572.—The instant case involved a straightforward point, the decision of which should hardly have been in doubt, but there is so little authority on the interpretation of L. P. A. s. 176 that it is a case of some interest and value. In a will a testator devised and bequeathed " all my one-third share and all other my estate and interest in the family property at K ". In fact he owned one-third in fee simple and two-thirds in tail. It was held that the will referred sufficiently to the two-thirds share in tail as well as the first third. The argument that the will must list the entailed property in the form of a detailed inventory was rejected as beyond what the statute intended. The words " all other " were a clear reference to the two-thirds share. The state of the property at K could be ascertained and " id certum est quod certum reddi potest ". Vaisey, J., indicated the purpose of the section : " The object of the section and of the form in which it is cast must surely be to avoid any risk of a disentail being effected by inadvertence or involuntarily. A specific reference need not, in my judgment, be a completely accurate and detailed description. Indeed there is little difference between reference and allusion. What the testator is, in effect, saying is ' I own one-third of the property, and I have also another estate and another interest in it. I am now disposing of the entirety ' ".

(Theobald 68.)

Will—effective upon death—statutory power of advancement. Trustee Act, 1925, *s.* 32—*Consent of prior annuitant—forfeiture*

clause.—In *Re Taylor* (1950), 2 T. L. R. 507; [1950] W. N. 437. —This case is not entirely self-explanatory as several points were conceded without argument. An advance was made to a contingent remainderman, under a pre-1926 will of a testator dying after 1925, Wynn-Parry, J., had no difficulty in holding that the general rule that a will speaks from death and not execution applied to T. A., s. 32. Section 32 (3) limits the power to trusts " constituted or created " since January 1, 1926. It seems unarguable that no testamentary trust can be constituted until the will becomes operative, on the death of the testator. Section 32 requires the consent of any person entitled in priority to the person advanced who is prejudiced by the advancement. It was held that the giving of such consent by a prior annuitant whose interest was subject to a forfeiture clause did not work a forfeiture since, on the proper construction of the will, the amount of the annuity was not reduced, but the amount of the capital fund out of which it was raised. Under these circumstances it is not clear why any consent was necessary, unless the reduction of the capital is in itself a prejudice within section 32 (1) (*c*) but not one which has yet affected the income.

(Theobald 327.)

Settlement—statutory power of maintenance of infant—express power escapes ambit of Trustee Act, s. 31.—In *Re Vestey's Settlement*, [1950] 2 All E. R. 891 (C. A.) the Court found itself having to deal with rather elaborate arguments, but the general principle is clear. In order that the provisions of T. A., s. 31 may apply, whether under a settlement or a will, the income available for maintenance of an infant must derive from property in which the infant has some interest, which carries income either because it is vested or because it carries income under a statute, etc. (*e.g.*, L. P. A., s. 175). In this case an infant was entitled to a reversionary interest which carried no intermediate interest. The settlement also created a discretionary trust under which the trustees applied income for the infant's benefit. The Court of Appeal held that T. A., s. 31 did not apply and that this application might be made in any way the trustees thought fit, *e.g.*, all could be paid to the infant and the balance over the actual expense of maintenance need not be accumulated.

(Theobald 325.)

Probate—missing will—other evidence.—In *Re Queen Marie of Roumania, deceased,* [1950] W. N. 457, the original will of the late Queen Marie could not be found. A partition agreement among the heirs, executed according to a special Roumanian law governing royal estates, reproduced the substance of the will. It was held, following *In bonis Prince Oldenburg* (1884), 9 P. D. 234, that this agreement could be accepted as a ground for the grant of administration *cum testamento annexo.*

(Theobald 64.)

Will—construction—ejusdem generis rule.—In *Re Hynes,* [1950] 2 All E. R. 879, a testator bequeathed "books, furniture and personal belongings". It was held that this gift did not pass bank balances or stocks and shares. It was not possible to treat the general words as amounting to a residuary gift. The Court did not specifically apply the "ejusdem generis" rule, but applied it in effect, since the references to books and furniture gave the words "personal belongings" a narrower meaning than they would have had by themselves.

(Theobald 169.)

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5. *LANDLORD AND TENANT CASES*

By J. Muir Watt, M.A., of the Inner Temple, Barrister-at-Law

Rent Restrictions Acts—two homes—animus revertendi and corpus possessionis—protection of Acts.—*Hallwood Estates, Ltd.* v. *Flack,* [1950] W. N. 668, is another illustration of the truth, exemplified in *Langford Property Co., Ltd.* v. *Tureman,* [1949] 1 K. B. 29, that the Rent Restrictions Acts may recognise that in some cases a man requires two homes. In this case a tenant carried on a school, with the landlord's permission, at a house let to him as a residence. He later became a statutory tenant of the house, and continued to carry on the school. Subsequently his wife acquired a house not far away, which became the matrimonial home. The tenant, however, retained a bedroom in the original house which he used two or three nights a week. In 1949 he ceased to use this bedroom for a time, but retained it for possible use, and there was evidence that he and his wife intended to return to live at the school house, the wife disposing of the house she had

purchased. The Court of Appeal upheld the County Court Judge's decision that the tenant had not lost the protection of the Rent Restrictions Acts in respect of the school house. There was evidence on which the Judge was entitled to find the existence of both an *animus revertendi* and a *corpus possessionis*.

(Rent Restrictions Guide, 3rd ed., p. 102.)

Landlord and Tenant (Rent Control) Act, 1949—*Requirement of premium for grant of tenancy—agency of rent collector—liability of estate agents for act of servant.*—Estate agents with rent collectors in their employment will be relieved to hear of the decision of the Divisional Court in *Barker* v. *Levinson*, [1950] 2 All E. R. 825. In that case a rent collector in the employment of an estate agent illegally demanded a premium as the condition of the grant of a tenancy, contrary to section 2 (1) of the Landlord and Tenant (Rent Control) Act, 1949. The estate agent was charged with an offence under the Act. The extent of the rent collector's authority was merely to satisfy himself that the prospective tenant was likely to be a satisfactory tenant, and he had no authority to negotiate the terms of the tenancy. It was not proved that the employer authorised the rent collector to require the premium or, indeed, that he knew anything about it. It was held that the estate agent was not liable for the rent collector's wrongful act, which was not within the scope of the latter's authority.

(Rent Restrictions Guide, 3rd ed., pp. 73–76.)

Landlord and Tenant (Rent Control) Act, 1949—*jurisdiction of Rent Tribunal to determine a reasonable rent excluded while a limitation of rent is in force by or under any enactment—no limitation of rent in building licence—Building Materials and Housing Act*, 1945, *inapplicable—registration of purported condition as a land charge ineffective to oust Tribunal's jurisdiction.*—Section 1 (7) of the Landlord and Tenant (Rent Control) Act, 1949, provides that no application can be made to a Rent Tribunal to determine a reasonable rent if, *inter alia*, there is in force a limitation of rent by or under any enactment not contained in the Rent Restrictions Acts or the 1949 Act itself. An example would be a limitation of rent contained in a building licence, which would be effective by virtue of section 7 of the Building Materials and Housing Act, 1945. Such a limitation must, however, actually be contained in

the building licence in order to bring the statutory condition of section 7 into operation. In *R.* v. *Barnet, etc., Rent Tribunal, ex p. Reeds Investments, Ltd.*, [1950] 2 All E. R. 848, no condition limiting rent was inserted in the building licence, but the local authority evidently had intended to impose such a limitation since they purported to register the " condition " as to rent as a local land charge under section 15 of the Land Charges Act, 1925, in pursuance of section 8 of the 1945 Act. Further, the *application* for the building licence had stated that the maximum rent charged would be £220 a year. It was held by the Divisional Court that there was no limitation of rent in existence by or under any enactment within the meaning of section 1 (7) of the 1949 Act. As the building licence contained no limitation of rent, section 7 of the Building Materials and Housing Act, 1945, did not come into play. The registration under the Land Charges Act, 1925, was not a limitation of rent imposed by an enactment. The entry in the register under that Act purported to record a condition imposed by a building licence which in fact was not so imposed. It was merely a false record in the register.

(Rent Restrictions Guide, 3rd ed., p. 67.)

Agricultural Holdings Act, 1948—*inn with agricultural land—whether an " agricultural holding "—refusal of consent to notice to quit.*—The case of *Dunn* v. *Fidoe*, [1950] 2 All E. R. 685, decided under the Agricultural Holdings Act, 1948, affords an interesting contrast to the well-known decision in *Re Lancaster and Macnamara*, [1918] 2 K. B. 472, decided under earlier agricultural holdings legislation. In the earlier case it was decided that property consisting of an inn and a farm let together was not a " holding ", and that, therefore, the tenant could not claim compensation for improvements at the end of his tenancy under the Agricultural Holdings Act, 1908. This decision led to the enactment of section 33 of the Agricultural Holdings Act, 1923, which enabled compensation for improvements and disturbance to be claimed in certain cases where a contract of tenancy included some " non-statutory land ". The basis of the decision in *Re Lancaster and Macnamara* was that, in view of the definition of " holding " in the 1908 Act, if substantial business premises were let together with a farm by a single contract of tenancy, neither the whole composite property nor the farm constituted a " holding " within the meaning of the Act.

The definition of an " agricultural holding " in the Agricultural Holdings Act, 1948, is quite different from that in the earlier legislation, and the Court of Appeal have now held, in *Dunn* v. *Fidoe*, that a composite subject of letting, comprising an inn and some pasture and orchard land, constitutes an " agricultural holding ". The security of tenure provisions of section 24 (1) of the 1948 Act, which make it very difficult for a landlord to get rid of an agricultural tenant, accordingly applied to it. It may be noticed that the inn yielded the larger share of the profit, but that there was a finding by the County Court Judge that the inn was used in connection with the agricultural business of the tenant. This finding rendered academic the speculations of Tucker, L.J., about the possibility of a notice to quit premises consisting partly of agricultural and partly of non-agricultural land being valid without the Minister of Agriculture's consent so far as it applied to the latter but invalid so far as it applied to the former. In view of the express provisions dealing with the validity of notices to quit parts of a holding contained in sections 31 to 33 of the 1948 Act, the opinion expressed by Tucker, L.J., on this point is somewhat difficult to accept.

(Jackson's Agricultural Holdings, 10th ed., pp. 4–5.)

Notice to Quit—uncertainty whether tenancy weekly or yearly —inadequacy of notice to quit purporting to be applicable to either. —Where there is some uncertainty as to the date of commencement of a tenancy it is common form to frame the notice to quit so as to require the tenant to quit on a specified day " or at the expiration of the current period of your tenancy which shall expire next after the end of [one half year] from the service of this notice ". The case of *Chez Auguste, Ltd.* v. *Cottat*, [1950] W. N. 499, illustrates the limitations of a variant of this formula. In that case there was a dispute as to whether the tenancy was a weekly or a yearly one, and, with a view to dealing with either possibility, the landlords on September 20, 1949, served notice on the tenant to quit " on Monday, October 3, 1949, or at the expiration of the current period of your tenancy which shall expire next after the service upon you of this notice ". It turned out that the tenancy was in fact a yearly one, and Lord Goddard, C.J., decided that the notice was not adequate to determine the yearly tenancy. It was apt to determine a weekly tenancy and not a yearly one. This was the natural and reasonable meaning of the words. Lord Goddard applied the earlier case of *Mills* v. *Goff*

(1845), 14 M. & W. 72, where a notice was given to a yearly tenant on June 7, 1840, requiring him to quit "on October 11 now next ensuing, or such other day or time as his tenancy might expire on". The tenancy had commenced on October 11 in a previous year. It was held that this was not a good notice for the year ending October 11, 1841. It may be observed that Rolfe, B., said in that case that if the notice had been, "I give you notice to quit on October 11 now next ensuing, or if that be not long enough to make this notice good, then at the end of the next year of your tenancy", it would have been good.

The matter is of some interest for the draftsman. Doubtless the formula used in *Chez Auguste, Ltd.* v. *Cottat* could be improved to as to effect its purpose. As drafted, however, it was apt only to provide against a small error in regard to the date of the commencement of a weekly tenancy, not to provide for the possibility of the tenancy being a yearly one.

(Woodfall, 24th ed., p. 977.)

Landlord and Tenant—implied reservation of easement in favour of landlord—right to display advertisements on outer wall of demised premises.—It is a familiar rule that, although a lessor may expressly reserve an easement in his favour over the land demised, such an easement may only be implied in rare circumstances. The principle is that a grantor must not derogate from his grant. A recognised exception is the implied reservation of a way of necessity. This, however, is not the only exception which the law allows, but the Courts have never laid down precisely what the exceptions are. In *Re Webb*, [1950] 2 All E. R. 828, Danckwerts, J., decided that an exception existed in rather novel circumstances. At the date of the lease of the first and second floors of a building there were two large advertisements displayed on the outside wall of the demised premises, one advertising the landlord's business, which was carried on on the ground floor, and one advertising a well-known brand of matches. The outside wall upon which the advertisements were displayed was included in the demise. The tenant was under an obligation to repair the inside of the premises, but not the outside, and there was no obligation on the landlord to repair the outside. The lease was silent about the advertisements. The tenant disputed the landlord's right to have the advertisements displayed upon the wall. Danckwerts, J., decided that the circumstances justified an implication in favour of the landlord of an easement to display the two advertisements

which were in existence at the date of the lease and to repair them and generally maintain them. The right was, however, limited to these two advertisements, and did not entitle the landlord to substitute different ones or to permit anyone else to do so. The underlying principle appears to be, what is a reasonable inference as to the intention of the parties?

(Woodfall, 24th ed., p. 226.)

Option to determine lease if required for purposes of landlord's business—not immediately required when option exercised—effect of omission of words "or any part thereof".—In *Parkinson* v. *Barclays Bank, Ltd.*, [1950] 2 All E. R. 936, a lease for twenty-one years contained an option permitting the landlords to determine it upon notice at the end of fourteen years if they should require the premises for the purposes of their business. The Court of Appeal held that the landlords were entitled to exercise the option although at the date of exercise they did not immediately require the premises for the purposes of their business. The position was that at that time they did not know the exact date when they would require the premises; their intention was to use part (not the whole) of the premises for the purposes of their business at some time during the last seven years of the original term. The Court rejected the tenant's arguments that the option was exercisable by the landlords only if (1) they actually required the premises at the end of the fourteen years, (2) they then required *the whole* of the premises—the clause not containing the words "or any part thereof".

In spite of this decision a draftsman who wishes to ensure that the landlord can exercise an option in similar circumstances would do well to insert the words "the premises hereby demised or any part thereof". Also, the draftsman should avoid the expression "then require". If the word "then" had been used in the above case the decision might have been different.

(Woodfall, 24th ed., pp. 985–988.)

Encroachment by tenant on landlord's property adjoining demised premises—property treated by both parties as included in lease—tenant liable to repair in accordance with repairing covenants.—There is old authority to the effect that where a tenant encroaches upon the adjoining waste (not the landlord's

property) during the term, such encroachments are *prima facie* for the benefit of the tenant during the term and afterwards for the benefit of the landlord, and that the covenants to repair contained in the lease will extend by implication to the encroachments and the buildings thereon : *Re Newbery* (1858), 26 Beav. 17. Until the recent case of *J. F. Perrott & Co., Ltd.* v. *Cohen*, [1950] 2 All E. R. 939, however, the question had not been decided whether, if a lessee encroaches on property *of the lessor* which adjoins the demised premises, the lessee becomes liable to repair the property on which he has encroached, as if it had been covered by the repairing covenants in the lease. The Court of Appeal have now decided that the lessee does become liable to repair the property on which he has encroached in these circumstances. In this case the subjects of the encroachment were lavatories adjoining the demised premises, which had not been included in the demise, but which the lessee used and occupied with the lessors' acquiescence over a long period as if they had been so included. This decision is in line with *Tabor* v. *Godfrey* (1895), 64 L. J. Q. B. 245, which decided that an encroachment upon the landlord's adjoining land, after occupation by the tenant for more than twelve years, cannot be recovered by the landlord during the term, but is deemed to be occupied by the tenant as part of the holding and is recoverable at the end of the term—no title adverse to the landlord after the term being acquired.

(Woodfall, 24th ed., pp. 1010–1011.)

Forfeiture of lease—suffering premises to be used as a brothel—knowledge by lessee of underlessee's acts—discretion of Court.—*Borthwick-Norton and others* v. *Dougherty*, [1950] W. N. 481 is a similar decision to *Borthwick-Norton and others* v. *Romney Warwick Estates, Ltd.*, [1950] 1 All E. R. 798 (noted in *The Conveyancer* for June, 1950, at p. 211). The lessee, with knowledge of what was going on, failed to take sufficient steps to get rid of an under-lessee who was using the demised premises as a brothel. In an action for forfeiture for " suffering " the premises to be so used, contrary to a covenant in the lease, the Court refused to grant the lessee relief. It is satisfactory that the Court has reaffirmed the strict view taken in the earlier case of these serious breaches of covenant.

(Woodfall, 24th ed., p. 941.)

Lighting of Common staircase of block of flats—no implied covenant by landlords to keep staircase lighted.—A decision of some interest to flats companies (and their tenants) is *Devine* v. *London Housing Society, Ltd.* (1950), 46 S. J. 743, where Croom-Johnson, J., held that a company owning a block of flats was under no implied obligation to keep the common staircases lighted after dark, so as to render them reasonably safe for the use of their tenants. There was no express agreement in regard to lighting, but the company had in fact provided some lighting both before and after the war and continued to provide some now. The lighting was controlled by a time switch, but it apparently was cut off rather erratically, and it was never quite certain whether a tenant would find it on or off when he or she returned at night. A tenant who fell in the darkness and sustained injuries sued the company for damages, both in contract and in tort. The claim in contract was dismissed for the reason given above, and that in tort failed because the unlit condition of the staircase was obvious and could not amount to an "unusual danger" within the "invitee" doctrine.

(Woodfall, 24th ed., p. 568.)

Rent Restrictions Acts—land or premises let together with a dwelling-house—addition to garage—whether change of identity.—The House of Lords has reversed (Lord Goddard dissenting) the decision of the Court of Appeal in *Langford Property Co., Ltd.* v. *Batten*, [1949] 2 All E. R. 422 (discussed in *The Conveyancer* for September, 1949, at pp. 389–390), which turned on the question whether the letting of a flat together with a garage, which had not been included in the letting which determined the standard rent of the flat, constituted the letting of a new entity to which the old standard rent did not apply or merely a letting of the old dwelling-house improved, but not substantially altered, by the addition of the garage. As at the time of writing the only available report is in *The Times* of November 17, 1950, comment on the House of Lords decision, and the observations of their Lordships on *Vaughan* v. *Shaw*, [1945] K. B. 400 and *Hemns* v. *Wheeler*, [1948] 2 K. B. 61 is reserved until the next issue.

(Rent Restrictions Guide, 3rd ed., p. 31 and p. 48)

Landlord and Tenant Act, 1927—*section* 5 (2)—*meaning of "within two months after the service of the notice.*—For the same reason as in the last-noted case, comment is reserved until the next issue on *Kerridge* v. *Lamdin*, reported in *The Times* of November 16, 1950, in which the Court of Appeal has pronounced on the construction of the words "within two months of the service of the notice" in section 5 (2) of the Landlord and Tenant Act, 1927, which have been the subject of differences of opinion among text book writers. The words have now been held to refer to the notice to quit, not the notice of claim for a new lease.

(Woodfall, 24th ed., pp. 1078–1079)

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6. *DEATH DUTY CASES*

By L. J. Stein, Barrister-at-Law

The point at issue in *Midland Bank Executor and Trustee Co.* v. *C. I. R. and Others*, [1950] T. R. 289, was whether the deceased, who had an English domicil of origin, had died domiciled out of Great Britain. The somewhat complicated facts are, in themselves, of no general interest, but attention is drawn to the case as illustrating the tests to be applied where the crucial question is that of the acquisition of a domicil of choice.

Estate duty—policy of life insurance—Customs and Inland Revenue Act, 1889, *s.* 11 (1)*; Finance Act*, 1894, *s.* 2 (1), (*c*)—*Re Oakes*, [1950] 2 All E. R. 851, raised a number of questions on the construction of those provisions of section 11 (1) of the Customs and Inland Revenue Act, 1889 (incorporated by reference in section 2 (1) (*c*) of the Finance Act, 1894), which relate to policies of life insurance and extend the charge of estate duty to moneys received thereunder. In *Re Oakes*, above, the deceased had effected a policy of insurance on his life for the benefit of his wife, if she survived him, the benefit of the policies to vest in him if he survived his wife. The first two premiums had been paid by the wife's father. The policy had subsequently been converted into a fully paid policy by means of a lump sum payment made by the deceased. The deceased and his wife had then executed a settlement whereby the policy was assigned to trustees on trusts for the benefit of their issue. Some years later the deceased had died, survived by his

wife. On these facts, it was held by Romer, J., (1) that, the deceased having been the person who had applied for the policy and entered into the contract with the insurers, the mere fact that the first premium had been paid by the wife's father did not prevent the policy from having been " effected by " the deceased; (2) that the lump sum payment whereby the policy was converted into a fully paid policy fell to be treated as a " premium ", the payment having been merely in composition of future premiums; (3) that, although the deceased had had a contingent beneficial interest in the policy, this did not prevent it from having been " wholly kept up " by the deceased " for the benefit of a donee ", *viz.*, his wife, there being no warrant for construing the section as though it read " wholly kept up by the deceased wholly for the benefit of a donee ".

7. *INCOME TAX CASES*

By L. J. STEIN, Barrister-at-Law

Income tax—child allowance—Divorce Court—order for payment in trust for children—Finance Act, 1936, *s.* 21—*Yates* v. *Starkey*, 66 T. L. R. Pt. II, 443, raised an interesting question on the definitions of " settlement " and " settlor " in section 21 of the Finance Act, 1936, which is designed to defeat tax avoidance by means of settlements in favour of children. The taxpayer, the respondent in divorce proceedings instituted by his wife, had been ordered by the Court to pay to the wife an annual sum of £100, less tax, in trust for each of three children of the marriage. A claim by the taxpayer to child allowance in respect of the children had been refused on the ground that each child had in its own right an income exceeding the statutory amount. On appeal, the taxpayer's first contention was that the Court had no jurisdiction to create a trust in favour of the children, but Vaisey, J., distinguishing *Stevens* v. *Tirard* (1940), 23 T. C. 321, held that such jurisdiction did exist and had been exercised. The next question was whether the payments to the children must be treated, nevertheless, as income of the taxpayer, and not of the children, by virtue of section 21, above. Citing *Hood-Barrs* v. *C. I. R.* (1946), 27 T. C. 385, the learned Judge held (1) that, the trust created by the order was a " settlement " within the statutory definition in subsection (9) of the section, and (2) that, notwithstanding that the taxpayer had not voluntarily entered into the " settlement " but

had merely submitted to the order of the Court, he was within the statutory definition of " settlor ", either as a person " by whom the settlement was made or entered into . . . indirectly " or, in any case, as a person " who has provided or undertaken to provide funds . . . for the purpose of the settlement ".

THE LIBRARY

THE INHERITANCE (FAMILY PROVISION) ACT, 1938. By MICHAEL ALBERY of Lincoln's Inn, Barrister-at-Law, with a Foreword by the Hon. Mr. JUSTICE VAISEY. London: Sweet and Maxwell, Ltd. 1950. viii and 70 pp. 10s. 6d. net.

This book should find a place on the bookshelf of every practitioner who is likely to be called upon to advise on the many problems arising under this Act which although short is full of difficulties and traps for the unwary.

In this book Mr. Albery seeks to guide his readers safely past such difficulties and intricacies by the light, however dim and uncertain, of the important judicial decisions given upon this Act, and where that light fails then by the expression of his personal views and criticisms which even if lacking in authority provide much cause for reflection. To use the words of Mr. Justice Vaisey in his foreword to this book: " It was quite time that we had a trustworthy guide to this small but important region of the law, and with this I believe that Mr. Albery will be found to have supplied us ".

An indication of the contents of this compact and well-produced volume will best demonstrate its potential everyday usefulness. First there is Mr. Albery's commentary upon the Act: the value of this has been suggested above. This is followed by the text of the Act and of Order LIVF; a very helpful synopsis of cases decided on the Act; and a Precedent of a Settlement upon a Mistress and illegitimate child for the purpose of evading the provisions of this Act. As a matter of interest to our readers this Precedent is reprinted from this Journal (Volume 9 (N.S.), p. 282).

The reviewer believes that this little book will be given a favourable reception from all who have occasion to refer to it.

S. M. S. NATHAN.

THE LAW OF TRUSTS. Fifth edition. PROFESSOR G. W. KEETON, LL.D. Pitman's. 1950. lix and 475 pp. 30s.

Professor Keeton has produced a comprehensive and accurate new edition of his standard treatise on the law of trusts. This subject is always rich in new and interesting cases, and these have been incorporated into the text, *e.g.*, the cases on protective trusts, implied trusts and charitable trusts. The celebrated cases of *Re Diplock*, [1948] Ch. 465 (C. A.) and *Re Coats' Trusts*, [1949] A. C. 427, are among these. The learned author has to meet a double responsibility, to the student of the law of trusts at London University and elsewhere, and to the practioner, banker and business man. In the main he succeeds in meeting the rather different demands of both groups. It may be fair to say that the book sometimes leans too much toward the practical. This does not mean that important academic subjects, *e.g.*, the nature of the beneficiary's interest, are neglected, or that legal periodicals are not cited (in fact there are a number of references to recent articles in the *Conveyancer*). But a certain conservatism in altering the text is probably due to a desire to avoid drastic rearrangements of the material. This produces the danger that a "gloss" of footnotes is developing, and that new cases are too readily fitted into old rubrics without fully suggesting the growth and change of the law. In an edition by another hand this would be more understandable, but where it is by the original author more drastic and vigorous rewriting might be helpful to the beginner. This is especially true in the section on Statutes of Limitation, where the reader is left with a lengthy statement on the old law, and a short rider on the Limitation Act, 1939, and has to work out his synthesis of the current position for himself. The practical bias appears from the treatment of *Re Brockbank*, [1948] Ch. 206, where Professor Keeton neatly sums up the practical reason why the case was fought, by referring to considerations of stamp duty, but does not use the case to illustrate the limitations of the general rule in *Saunders* v. *Vautier* (1841), Cr. & Ph. 240. The *Vivisection Case*, [1948] A. C. 31, is cited on the narrow issue of the promotion of legislation (p. 155) and not on the broad problem of public benefit.

Only one or two points appear open to substantive criticism. The treatment of *Re Gee*, [1948] Ch. 284, on p. 311, seems misleading; it refers to a director-trustee using his own votes to become elected, but Harman, J. (at p. 296), made it clear that the trust shares were in a minority and the appointment would have been carried without them. The treatment of the remedy

in personam in *Re Diplock* (*supra*) is not quite clear. On p. 374 it is pointed out that no notice need be proved to make the overpaid legatee liable, but on p. 375, *Re Robinson*, [1911] 1 Ch. 502, is cited as an illustration, and the text cited refers to notice by the legatee. The whole treatment of *Re Diplock* follows the judgment too closely; thus the lengthy account of *Re Rivers*, [1920] 1 Ch. 320, in effect a direct quotation from the *Diplock* judgment, is hardly apt for a student's treatise. The discussion of "voluntary" payments is also none too clear. It referred to payment in full of a lawful legacy and subsequent deficiency of assets, not payment of a legacy which might not legally be paid at all.

A few important cases might be added in future editions, though it is clearly impossible to cover everything. *Att.-Gen.* v. *Kell* (1840), 2 Beav. 575, decided the interesting point that a founder of a charity cannot alter its terms. In practice frequent reference is made to *Klug* v. *Klug*, [1918] 2 Ch. 67, on trustees' discretion. *Luke* v. *S. Kensington Hotel Co.* (1879), 11 Ch. D. 121 is a useful authority for unanimity among trustees.

These minor criticisms do not disparage the general completeness of the book or its usual clarity. A slightly greater discursiveness might make it more stimulating to students, without sacrificing the virtues which it obviously possesses.

The general appearance of the book is attractive and it is large enough to be valuable, without being unmanageable. A rather long lapse of time in the press is to be regretted and explains some omissions. The author's preface is dated a year earlier than the publication date. This means that no cases later than the autumn of 1949 are covered, and some of these only from the *Weekly Notes*. Statutes are dealt with up to the end of 1948 only, so that the reader must bear in mind the provisions of recent Married Women's legislation, the sections of the 1950 Finance Act on certain quasi-charitable bodies, and other new statutes. The present reviewer has not noticed any misprints or other errors.

A. K. R. Kiralfy.

Kelly's Draftsman. Ninth Edition. By W. J. Williams, B.A., of Lincoln's Inn, Barrister-at-Law. London: Butterworth & Co. (Publishers) Ltd. 1950. lxiv and 666 and (index) 61 pp. Price 50s.

The character of *Kelly's Draftsman* is so well known that it requires no introduction to conveyancers. In this edition the material has been increased by 37 per cent. in order to meet

"the day-to-day requirements" of practitioners based upon the experience of the learned editor derived from correspondence in connection with the *Encyclopædia of Forms and Precedents*. The notes have been retained and in some cases additions have been made. It is, of course, common experience that all these practical short books do tend to expand and the notes to include more and more short disquisitions on points of law. How far this is really desirable is a matter of opinion, but it cannot be doubted that at least it meets with favour in the eyes of a number of practitioners. Indeed, the difficulty is commonly experienced of knowing where to stop both in the supply of precedents and in the information to be supplied in notes, but it is a matter of opinion and no two opinions would probably be the same. Hence criticism is more or less irrelevant, but so far as we have tested them the notes and precedents appear to be accurate and useful.

There is, however, one point on which a special word should be said. Every volume of precedents issued now must consider the problems of the Planning Acts. So far as conveyancers are concerned the learned editor expresses the opinion (at p. 218) that generally speaking in conveyances no special provision need be made, but he provides a variety of clauses for use in special cases. The opinion and practice of the profession on this point appears to be hopelessly at variance at the present time, and this position is clearly met by the forms provided for those who insist upon using them. In the case of leases and mortgages the learned editor appears to take the view that some provision is necessary and has added notes explaining when he thinks the clauses are desirable. The clauses provided in all three cases are fairly full and seem to deal adequately with the normal problems as do also his clauses for preliminary inquiries and special conditions. It is thought that there are special cases not dealt with, but it is unreasonable to expect this. The Agriculture Act and the Agricultural Holdings Act has also received the same careful attention.

There is no doubt that the learned editor has accomplished his project of bringing the work into line with modern requirements on the principles on which the book is founded.

PRECEDENTS

Form 1

Tenancy Agreement with an Employee subject to the Rent Restriction Acts (*a*)

Parties.

AN AGREEMENT made the —— day of —— BETWEEN A of *etc.* (hereinafter called "the Landlord") of the one part and B of *etc.* (hereinafter called "the Tenant") of the other part.

Agreement to let.

1. The Landlord agrees to let and the Tenant to take the dwelling-house known as —— situate at —— at a weekly rent of —— such tenancy to commence on Monday the —— day of —— and to be determinable by a week's notice by either party.

Tenant's undertakings.

2. The Tenant hereby undertakes with the Landlord as follows:

(a) The Tenant shall keep the premises clean and replace all broken glass and repair all fittings and fixtures damaged by him and shall keep the garden in good order and condition

(b) The Tenant shall not assign charge or sublet or part with possession of the premises or any part thereof

(c) The Tenant shall not do or permit to be done upon the premises any act or thing which may cause discomfort or annoyance to the adjoining owners or tenants

(d) The Tenant shall permit the landlord at all reasonable hours by himself, his agents and workmen to enter on the premises to inspect the state of repair thereof and to do all necessary repairs thereto.

Landlord's undertakings.

3. The Landlord hereby undertakes with the Tenant to pay all rates (including water rate) and taxes payable in respect of the premises and to keep the premises in good repair and condition.

4. It is HEREBY MUTUALLY AGREED as follows:—

(*a*) This form was drafted by Miss B. A. Bicknell, of Lincoln's Inn. See article, *ante*, p. 36.

(1) The Landlord shall be entitled to deduct the rent hereby reserved from any wages which may be due from the Landlord to the Tenant

Determination of tenancy.

(2) The premises are hereby let to the Tenant in consequence of his employment by the Landlord and to provide a home for the Tenant near his place of work with the Landlord and on the determination of his employment with the Landlord the tenancy hereby granted shall forthwith determine.

AS WITNESS, *etc.*

Form 2

Occupational Licence without monetary payment (*a*)

Parties.

A LICENCE made the —— day of —— One thousand nine hundred and — BETWEEN A of *etc.* (hereinafter called "the Employer") of the one part and B of *etc.* (hereinafter called "the Occupier") of the other part.

Recitals: Agreement for employment.

WHEREAS the Occupier has agreed to enter the employment of the Employer as a —— and the Employer has agreed that the Occupier shall occupy —— during such time as he shall continue to be employed as —— at ——.

Agreement.

NOW IT IS AGREED by and between the parties hereto as follows:—

Licence to occupy.

1. The Occupier shall be allowed to occupy —— aforesaid free of rent rates or taxes.

Terms of occupation.

2. The occupation of the said —— shall not create any tenancy thereof as between the parties hereto or give the Occupier any estate or interest in the premises but such occupation shall be deemed to be that of a servant of the Employer and on his behalf and the right of occupation shall determine with the determination of the service of the Occupier with the Employer.

AS WITNESS the hands of the said parties hereto.

(*a*) This form was drafted by Mr. K. F. Simpson, Solicitor. See article, *ante*, p. 36.

Form 3

Service Agreement Providing for the Occupation Rent Free by the Employee of premises provided by the Employer (*a*)

THIS AGREEMENT is made the —— day of —— BETWEEN A of *etc.* of the one part and B of *etc.* of the other part. Parties.

WHEREBY IT IS MUTUALLY AGREED as follows:—

1. The said B shall enter into the service of the said A as assistant in the business of —— carried on by the said A at —— from the —— day of —— at the monthly salary of £— payable on the first day of each month. The first payment to be made on the —— day of —— next. Agreement for service.

2. [*Here set out any terms and conditions of the employment.*]

3. During the continuance of this agreement the said B shall occupy the dwelling-house known as —— immediately adjoining the said business premises of the said A free of rent rates (including water rate) and taxes and shall reside in the said premises and keep the same and the fixtures and fittings therein clean and in good condition fair wear and tear excepted and shall on the determination of this agreement forthwith deliver up possession of the premises to the said A. Obligation to reside in employer's premises.

4. During the continuance of this agreement the said A shall pay all rates and taxes (including water rate) payable in respect of the said dwelling-house and shall keep the same in good repair and condition and shall in addition pay the cost of all gas and electricity consumed by the said B in the said premises. Payment of outgoings by employer.

AS WITNESS, *etc.*

(*a*) This form was drafted by Miss B. A. Bicknell, of Lincoln's Inn. See article, *ante*, p. 36.

Form 4

Licence for Service Occupancy where the Licensee is debited with a weekly sum against wages (*a*)

Parties.

A Licence made the —— day of —— One thousand nine hundred and —— between A of *etc.* (hereinafter called "the Employer") of the one part and B of *etc.* (hereinafter called "the Licensee") of the other part.

Agreement.

Whereby it is agreed as follows:—

Licence to occupy.

1. The Employer hereby licenses and authorises the Licensee to occupy the dwelling-house and premises situate and known as —— from the —— day of —— until this Licence is determined as hereafter mentioned for the sole purpose of enabling the Licensee to perform his duties as servant of the Employer.

Deduction from wages.

2. The occupation of the said dwelling-house and premises by the Licensee shall be regarded as part of the wages due to him from the Employer and the Employer shall accordingly retain a sum calculated at the rate of —— pound (s) (£—) for each calendar week or part of a week which would otherwise be payable as part of such wages and which represents the monetary equivalent of the privilege granted to the Licensee under this Licence (*b*).

Provision for payment of rates by employer.

3. The Employer shall pay to the local authority concerned all existing and future rates imposed in respect of the said dwelling-house and premises.

Provision for maintenance of premises in clean condition.

4. The Licensee shall keep the interior and fixtures of the said dwelling-house and premises in a clean condition and in such condition shall deliver up the same when he vacates the said dwelling-house and premises on the termination of this Licence and shall make good any damage to the said dwelling-house and premises or the windows sanitary arrangements

(*a*) This form was drafted by Mr. K. F. Simpson, Solicitor. The object of this precedent is to provide for the occupation of premises by an employee which is outside the scope of the Rent Acts. It is important to note that its use should be restricted to employees who are outside the scope of the Truck Acts, 1831–1940, otherwise clause 2 may be held to be an infringement of these Acts. See article, *ante*, p. 36.

(*b*) *Thompsons (Funeral Furnishers), Ltd.* v. *Phillips,* [1945] 2 All E. R. 49.

fittings or fixtures thereof caused by the wilful or negligent act or omission of the Licensee or any member of his family or household and in default the Employer may make good such damage and recover the cost thereof from the Licensee.

5. This licence shall be automatically terminated at the expiration of one lunar month's notice which either party may give to the other in accordance with the terms of the Contract of Service existing between them or in the event of the Licensee ceasing to be employed as servant of the Employer from any cause whatsoever. Provision for determination of licence.

AS WITNESS the hands of the said parties hereto.

Form 5

Covenants and Provisos relating to Rights of Entry to effect Repairs or other Works (*a*)

I

Covenant by Lessee to Permit Entry to Execute Repairs and other works

A. To permit the Lessor [and the Superior Lessors] and any owner or occupier of adjoining or neighbouring premises at any time during the said term to enter the demised premises [during reasonable hours in the day-time] (*b*) to execute repairs to the demised premises [or to any other part of the building of which the demised premises form part] or to instal drains pipes meters fuse boxes wiring and other apparatus for servicing other parts of the building of which the demised premises form part and to effect repairs to or renewals of such drains or other works and apparatus as aforesaid making good all damage thereby occasioned (*c*) [to the demised premises] Provided that the

(*a*) As to these forms see the article on "Powers of Entry to Execute Works", *supra*, p. 49.

(*b*) This may be desirable in the case of premises used for residential purposes, and may also be desirable where valuable stock or other articles are kept upon the demised premises.

(*c*) The whole clause is mainly based on the decision in *Greg* v. *Planque*, [1936] 1 K. B. 669. The words in square brackets following the

Lessor shall not cause any interference with the quiet enjoyment by the Lessee of the demised premises in so far as such interference is avoidable by the exercise of reasonable care.

Alternative Form

B. To permit the Lessor [and the Superior Lessors] and any owner or occupier of adjoining or neighbouring premises at any time during the said term [subject to twenty-four hours' previous written notice except in any case of urgent necessity] (without making compensation to the Lessee in respect of any temporary interference with the use or enjoyment of the demised premises or of any rights or facilities enjoyed by the Lessee under the terms of this Lease) to enter the demised premises and to do all or any of the following acts matters and things:—

(a) To effect decorations repairs or renewals to the demised premises or any fixtures therein [or to any other part of the building of which the demised premises form part] or to any adjoining or neighbouring building or the pipes wires drains or other apparatus in the demised premises or in any of such adjoining or neighbouring buildings (*d*)

(b) To instal pipes drains wires meters fuse boxes or other apparatus in upon or under the demised premises for or in connection with the servicing of any other parts of the said building or any adjoining or neighbouring building but so that nothing shall be done which shall constitute a material interference with the amenities of the demised premises or which shall materially reduce the accommodation thereof except during the period necessarily occupied by the execution of the works in question in a proper and expeditious manner.

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words "thereby occasioned" are essential if it is desired to limit the obligation of the lessor to the making good of damage to the demised premises. See *Crofts* v. *Haldane*, L. R. 2 Q. B. 194, and to exclude damage to the contents, see *Greg* v. *Planque*, *supra*, and *quære* also loss of profits or expenses involved in taking other temporary accommodation.

(*d*) Substitute "in any such building" if the passage within square brackets *or* the reference to any adjoining or neighbouring building is omitted.

II

Proviso affording Compensation upon Entry to Execute Works (*e*)

PROVIDED that the Lessor make good all damage to the demised premises and the contents thereof and shall pay fair and proper compensation to the Lessee in respect of all expenses and losses incurred by him in so far as such damage expenses and losses arise out of or in the course of the exercise of the powers conferred by this clause (*f*) [but nothing herein shall entitle the Lessee to compensation for loss of profits in respect of any trade business profession or other activity conducted by him at or from the demised premises] (*g*).

III

Proviso Qualifying Covenant for Quiet Enjoyment

PROVIDED that no act matter or thing lawfully done or omitted by the Lessor whether pursuant to the provisions of this

(*e*) It would seem, in principle, that the law would, in any event, imply a liability on the part of the lessor to do the works in a proper and workmanlike manner. Hence it would appear that if damage were caused to the demised premises or the contents thereof by any negligent or wrongful act or omission in the course of the work or in consequence of such an act or omission, the lessor would be liable to compensate the lessee. This proviso extends that liability to damage and expenses not due to any wrongful act or omission.

(*f*) It is thought that this proviso would entitle the lessee to reinbursement in respect of alternative accommodation if the effect of the execution of the works were to compel the lessee to vacate the premises in whole or in part, provided that a reasonable need for the alternative accommodation could be proved. The general rule which requires a claimant to act reasonably and not deliberately to take any step which would unnecessarily increase the damages would afford to the lessor a sufficient answer in respect of any unreasonable expenditure. Thus, if the demise included a spare room which was rendered unusable owing to the execution therein by the lessor of certain works, it is submitted that the lessee could not recover the expense of taking a tenancy of another room unless it was, in fact, required by him for a purpose which the spare room would have served if it had been available. It is thought that the position would be the same even if the spare room was furnished and available for occupation immediately before the execution of the works.

(*g*) It is apprehended that except in very special circumstances an intending lessee of offices or trade or business premises would strongly resist the insertion of the words within square brackets.

Lease or otherwise howsoever shall constitute a breach of this covenant (*h*).

Form 6

Deed of Partnership between Medical Practitioners, where the Senior Partner has entered the National Health Service before February 16, 1950, and the Junior Partner is outside the Service. Variations where both Partners are in the Service (*a*).

Drafted by E. H. Bodkin of Lincoln's Inn

Parties.

THIS DEED OF PARTNERSHIP is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called the "Senior Partner") of the one part and B of *etc.* (hereinafter called the "Junior Partner") of the other part

Recitals: senior partner's practice;

WHEREAS:—

(1) The Senior Partner has for some years carried on the profession of a physician and surgeon for private patients at —— and has recently also provided general medical services

(*h*) The intention is that this proviso shall be inserted immediately after the usual covenant for quiet enjoyment. It is freely admitted that in the view of the draftsman of this form this proviso is superfluous: cf. *Saner* v. *Bilton* (1878), 7 Ch. D. 815.

As the draftsman has been put to considerable expense by a decision of a Master of the High Court involving the contrary view, despite the argument of counsel, it may be that some conveyancers will think that it is worth while to add this proviso to the usual covenant for quiet enjoyment. Others may think that it is improbable that any other landlord will be as unfortunate as the draftsman, and that there is no need to revise the standard form. There is a good deal to be said for that view.

(*a*) Now that the National Health Service (Amendment) Act, 1949, has been passed to give effect to the Report of the Medical Partnerships Committee, it may be assumed that the service has reached its final form under the present Government. On a change of Government it is impossible to forecast what changes may be made; for instance, it has recently been suggested that the right to sell goodwill should be restored on surrendering the right to compensation. Doctors are, however, perhaps more likely now to enter into permanent arrangements, and it is possible to frame partnership deeds with somewhat more confidence. The principle that practice in partnership is to be encouraged was adopted as the basis of the Committee's Report, and is recognised in the Act itself, *e.g.*, s. 34 (9), it is still, however, desirable to insert a very wide arbitration clause to provide for possible changes in the law.

If the senior partner's name was entered on the medical list prior

at —— aforesaid under the General Medical Service having entered his name on the Medical List prior to 16th February 1950

(2) The Junior Partner has [not entered his name on the Medical List] [entered his name on the Medical List prior to the 16th February 1950] — junior partner outside scheme;

(3) The Senior Partner has agreed to take the Junior Partner into partnership with him on the terms hereinafter mentioned (*b*). — agreement for partnership.

1. The Senior Partner and the Junior Partner hereby mutually covenant and agree with each other that they will become partners in the profession of physicians and surgeons from the —— day of —— 19— for the term of their joint lives but determinable as hereinafter provided. — Covenant to practise in partnership.

2. (1) The Junior Partner shall be at liberty at any time hereafter to apply for his name to be included in the Medical List for the area wherein are situate the surgery consulting room — Junior partner's right to enter service.

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to February 16, 1950, the extended date under the National Health Service (Amendment) Act, 1949, he will be entitled to compensation for inability to sell his goodwill, such compensation being payable with interest on his death or retirement. See National Health Service (Practices Compensation) Regulations, 1948 (SI 1948, No. 1506).

The junior partner, assuming he has not entered his name before that date, will not qualify for compensation, even if he does so in the future. and it seems only fair for the senior to pay him for his share of goodwill on dissolution of the partnership. The price to be paid should, however, be calculated having regard to the fact that the senior partner will be unable to resell the share of goodwill which he has bought. In such a case where the purchase was made under a partnership agreement before the appointed day the purchasing partner would have been entitled to compensation. It seems also to be fair to provide that payment shall also be made for the junior partner's share of goodwill even where he has subsequently entered the service, but after the material date, in case the law is altered so as to permit of such payment. Usually, however, a practitioner with a valuable private practice would be unlikely to enter the service and thus lose the right of selling his goodwill. Where the senior partner has joined the service after the material date, and the junior partner is outside it, or where both partners are entitled to compensation it would seem fairest for no payment to be made in respect of goodwill unless possibly on a change in the law.

The Precedent has been drafted in the widest possible terms in order as far as possible to cover any reasonably likely changes in the law, *e.g.*, the right to surrender compensation.

(*b*) As the senior partner is in the service no premium can be charged.

or health centre at which the Senior Partner performs general medical services and to comply with any conditions imposed as a condition of the granting of such application but he shall not be entitled to apply for his name to be included in the Medical List for any other area unless and until such application shall have been made and refused by the Medical Practices Committee (*c*)

Power to dissolve partnership on junior partner entering service in another area.

(2) If (i) the Junior Partner's application for inclusion of his name in the Medical List for the area where the Senior Partner performs general medical services as aforesaid shall be granted subject to a condition excluding the performance by the Junior Partner of general medical services in that part of the area wherein are situate the surgery consulting room or health centre where the Senior Partner performs such services or (ii) if the Junior Partner shall on the refusal of such application by the Medical Practices Committee apply for the inclusion of his name on the Medical List for any other area and such application shall be granted then and in either of such events the Senior Partner may give six months' notice in writing to the Junior Partner to determine the partnership and on the expiration of such notice the partnership shall be determined accordingly and the Senior Partner shall have the like option of purchasing the Junior Partner's share in the goodwill and other assets of the partnership and on the like terms (*mutatis mutandis*) as though the partnership had been determined by one of the

(*c*) Unless the junior partner is to give up altogether his right to enter the service, it seems that a clause giving power to determine the partnership if he is only allowed to perform services in some other area should be inserted. Presumably, however, he would not be likely to enter into partnership with a practitioner in an area where he was likely to be refused permission to enter the service or given such permission on terms restricting his area of service. If his area of service is restricted or he enters the service in some other area, where perhaps an "inducement payment" may be offered, the carrying on of the practice in partnership may become virtually impossible. As to the terms of service under the Act, see National Health Service Act, 1946, s. 34 and National Health Service (General Medical and Pharmaceutical Services) Regulations, 1948 (SI 1948, No. 506). Positive "direction" has been definitely rejected by the Minister, and it does not appear to be necessary to provide for the possibility of either partner being required to perform services in another area.

means specified in clause 18 hereof and the Junior Partner had occasioned such determination (*d*)

(3) Neither partner may remove his name from any Medical List without the written consent of the other. Removal of name from list.

3. Either partner may retire from the partnership upon the terms and conditions following, that is to say:— Power to retire and sell share or introduce son.

(1) The partner desiring to retire shall give six months' notice in writing to the other partner of his intention so to do expiring in the case of the Senior Partner not earlier than the —— day of —— and in the case of the Junior Partner not earlier than the —— day of —— and on the expiration of such notice the partnership shall be determined accordingly

(2) The partner to whom such notice is given shall have the like option of purchasing the retiring partner's share in the unpaid profits goodwill and other assets of the partnership and on the like terms (*mutatis mutandis*) as though the partnership had been determined by one of the events mentioned in clause 18 hereof at the date of expiration of such notice

(3) If the partner to whom such notice is given shall not exercise the option aforesaid within the time hereby limited therefor the retiring partner shall be at liberty either to advertise his said share for sale (subject to any prohibition of law against payment for goodwill) and to sell the same to any duly qualified practitioner or in the case of the Senior Partner to transfer and make over such share to any son of his who may then be so qualified and the retiring partner shall be at liberty to introduce the purchaser or transferee (as the case may be) to the patients of the partnership and such purchaser or transferee shall execute a proper deed of accession defining his rights and liabilities and shall thereupon become a partner accordingly and be in a similar position in that respect to the retiring partner but so that he shall not be entitled to retire from the partnership under this present clause before the —— day of ——

4. The partnership shall be carried on under the style or firm name of A and B at the surgery or consulting room of the Name and place of business.

(*d*) If both partners were on the list before February 16, 1950, sub-clauses (1) and (2) will not be applicable.

Senior Partner at —— and at the respective residences of the partners or at such other premises as may be agreed and approved under the General Medical Service from time to time.

Assets of senior partner's practice to be taken over.

5. The motor and other vehicles accessories and horses and the drugs bottles phials instruments and apparatus (other than and except those purchased out of moneys provided under the General Medical Service) and the other chattels employed by the Senior Partner in his professional practice at the commencement of the partnership and the leasehold surgery or consulting room on which the same is carried on shall be assets of the partnership and the Senior Partner shall be indemnified by the partnership against the obligations of the lease of the said premises.

Salaries, etc., to be accounted for.

6. All salaries and other remuneration received from any appointments held or to be held by the partners or either of them (including salaries capitation fees or other remuneration in respect of services and duties under the General Medical Service whether paid to either partner or to the partners jointly or appropriated between them but not payments in respect of drugs and appliances thereunder) and all premiums from pupils or apprentices and pecuniary gratuities from patients (other than legacies) and all other professional emoluments of any description whether ordinary or extraordinary shall be treated and accounted for in the partnership books as profits of the partnership.

Outgoings.

7. All outgoings of whatsoever kind and expenses incurred in carrying on the partnership or in anywise relating thereto (including any expenses incurred in indemnifying the Senior Partner or his representatives against his liability under the said lease of the said surgery or consulting room) shall be charged against revenue and any deficiency shall be borne by the partners in the shares in which they are for the time being entitled to the profits of the partnership

Profits.

8. The partners shall [during the first —— years of the partnership] be entitled to the net profits of the partnership in the shares following that is to say: the Senior Partner to [two equal third parts] and the Junior Partner to [one equal third part] and losses shall be borne in the same proportions

[As from the expiration of —— years from the commencement of the partnership the profits goodwill and other assets shall belong to and be received by and losses borne by the partners equally] (*e*).

Drawings.

9. Each party may draw out on the 1st day of each month on account of profits an amount not exceeding £—— but shall on signature of the annual general account refund with interest the amount (if any) by which his drawings exceed his share of profits for that year.

Bankers.

10. All moneys and securities not required for current expenses shall be paid into and deposited with the —— Bank or such other Bank as may be agreed from time to time and either partner may draw cheques on the partnership account.

Accounts.

11.—(1) Proper books of account shall be kept by the partners and entries made therein of all attendances and such other matters transactions and things as are usually entered in books of account kept by physicians and surgeons and as may be necessary or proper under the General Medical Service and such books and all letters papers and documents shall be kept at the surgery or consulting room aforesaid or in the custody of the Junior Partner and shall be open to inspection by either partner

(2) On the —— day of —— in every year of the partnership (including the first) a general account showing the assets and liabilities of the partnership and the share of profits due to each partner shall be taken and such account shall be signed by the partners and shall thereupon become binding upon both partners except that any manifest error found and signified by either partner to the other within —— months shall be rectified.

Partners to be just and faithful.

12. Each partner shall be just and faithful to the other in all transactions relating to the partnership and shall give a true account of the same when reasonably required by the other.

To pay their separate debts.

13. Each partner shall punctually pay and discharge his present and future separate debts and engagements and shall at

(*e*) It is now usual when the partners are both in the Health Service to provide for the profits and losses to be shared equally after a fixed period, and for the goodwill to vest in them in equal shares. The share of profits should represent the value of the partner's services only: see National Health Service Act, 1946, s. 35 (4) (e).

all times keep the other partner and his representatives and the partnership assets indemnified against the same and against all actions proceedings costs charges claims and demands in respect thereof.

To attend to partnership business.

14.—(1) Each partner shall at all times devote the whole of his time and attention to the partnership business (including any professional services and duties to be performed under the General Medical Service) and carry out the same for the greatest advantage of the partnership and shall not without the written consent of the other partner carry on or be concerned or interested whether alone or as partner in any competing professional business

Vacations.

(2) Each partner shall nevertheless be entitled to vacations not exceeding in the aggregate —— weeks in each year

Power to appoint locum tenens.

(3) If either partner shall absent himself voluntarily from the partnership business for an aggregate period in any one year exceeding the aggregate period hereinbefore specified for vacations or shall absent himself for illness accident or other unavoidable cause for a continuous period exceeding —— days the other partner may engage and pay at the sole cost of the partner so absenting himself a qualified locum tenens until the absent partner shall again attend to the partnership business PROVIDED that the partner so absenting himself shall be entitled at his option to reckon any period of absence as a period of vacation for the purposes of this clause.

Restrictions on acts of partners.

15. Neither partner shall without the consent of the other

(i) assign or mortgage his share in the partnership

(ii) hire or (except in case of gross misconduct) dismiss any person in the employment or service of the partnership or introduce any person into the partnership as an apprentice or otherwise

(iii) do or knowingly suffer anything whereby the property of the partnership may be seized or taken in execution.

Power to expel partner.

16.—(1) If either partner shall (a) fail to account for or to pay over or refund any moneys for which he is accountable to the partnership within —— days after being required so to do in

writing by the other partner or (b) suffer his share to be charged for his separate debt (c) become bankrupt or insolvent or enter into any arrangement or composition with his creditors (d) commit any flagrant breach of professional etiquette or of his duties as partner (e) have his name removed from any Medical List by the Tribunal (f) become permanently incapacitated by lunacy ill health accident or otherwise from performing his part of the partnership contract then and in any such case the other partner may by notice in writing to the defaulting partner expel him from the partnership and publish a notice of dissolution of the partnership in the London Gazette and the partnership shall be determined as from the date of the giving of such notice of expulsion but without prejudice to any antecedent breach of the provisions of the partnership express or implied

(2) A partner expelled under the present clause shall have no right of access to the books of the partnership or to join in taking any annual general account or valuation hereunder

(3) The other partner shall have the like option of purchasing the share of the expelled partner in the unpaid profits goodwill and other assets of the partnership and on the like terms (*mutatis mutandis*) as though the expelled partner had given notice of his desire to retire from the partnership under the power for that purpose hereinbefore contained and the notice had expired at the date of expulsion.

Power for junior partner to purchase further share.

17. The Junior Partner shall have the option to be signified to the Senior Partner in writing on or before the —— day of —— of purchasing from the Senior Partner a further share not exceeding one—— share of the future profits goodwill and other assets of the partnership as from such day upon the terms contained in clause 17 as though the date aforesaid were the date of determination of the partnership but so that no sum shall be payable in respect of the unpaid profits due to the Senior Partner at the date aforesaid which shall belong to him (*f*).

Provisions for dissolution;

18.—(1) Upon determination of the partnership by the death of either partner or by the Court consequent upon the lunacy

(*f*) If the variations in clause 8 providing for the shares to become equal after a fixed period are inserted, clause 17 will, of course, be omitted.

option to purchase;

incapacity or misconduct of either partner the other partner shall have the option of acquiring as from the date of dissolution the share of the partner who shall have occasioned such determination (hereinafter called the outgoing partner) in the goodwill and other assets of the partnership and such option shall be exercised by giving notice in writing within three months of such determination to the outgoing partner or his representatives

valuation of share;

(2) The purchase money for such share shall (subject as hereinafter provided) be the fair value thereof at the date of determination for which purpose a valuation shall be made of any assets requiring valuation

payment for goodwill if lawful.

(3) The outgoing partner's share of the goodwill shall (provided payment therefor shall be lawful whether by reason of his name not being then included in any Medical List or by reason of any change in the law or otherwise and provided he shall not be entitled to compensation for inability to sell such share of goodwill) be valued at —— years' purchase or if the purchasing partner shall be prohibited by law from selling the purchased share at —— years' purchase of the average profits of the partnership calculated if the partnership shall so long have continued during the —— years immediately preceding the last day for taking the annual general account and if not then from the commencement of the partnership up to that date Provided also that if payment for such share of goodwill shall be or become unlawful no payment shall be made therefor but the right thereto shall vest in the continuing partner without payment on the date of determination and any sums already paid by the outgoing partner under this present provision attributable to goodwill shall be refunded to him (*g*)

[No payment for goodwill.]

[(3) No payment shall in any event be made in respect of the outgoing partner's share of goodwill but the right thereto

(*g*) As the law stands no payment can, of course, be made to the senior partner for goodwill while his name remains on the list. If both partners have joined the service before February 16, 1950, this clause could still be used to provide for changes in the law; but in that case it is more usual to provide for no payment to be made for goodwill, even if a change were made in the law, *e.g.*, permitting sale of goodwill on surrender of the right to compensation.

shall vest without payment in the continuing partner on the date of determination]

(4) Any premises used for the purposes of the partnership shall if payment cannot lawfully be made for the outgoing partner's share of goodwill be valued on the footing that they have not previously been used for the purposes of a medical practice (*h*) Valuation of premises.

(5) The purchase money when ascertained shall be paid by —— equal quarterly payments (the first to be made at the expiration of —— months from the date of determination of the partnership) with interest at the rate of £— per cent. per annum on the amount for the time being unpaid and shall be secured by the bond of the purchasing partner Payment of purchase money.

(6) The outgoing partner or his representatives shall do all acts and sign all documents necessary to vest in the purchasing partner the goodwill and other assets of the partnership at the date of determination Outgoing partner to vest assets.

(7) Subject as aforesaid the partnership shall be wound up as provided by the Partnership Act 1890. Subject to option Partnership Act to apply.

[18.—(1) Upon determination of the partnership whether by notice hereunder or by the death of either partner or by the Court consequent upon the lunacy incapacity or misconduct of either partner the goodwill and other assets thereof shall vest absolutely in the partner to whom notice of retirement or by whom notice to expel the other partner shall have been given or the partner other than he who shall have occasioned the determination by death or otherwise as the case may be [On dissolution assets to vest in continuing partner.]

(2) The continuing partner shall discharge the partnership debts and liabilities as from the date of determination and the partnership shall discharge the debts and liabilities up to that date.] (*i*)

19. The partners hereby mutually covenant and agree that in consideration of the agreement for partnership hereinbefore Covenant against competition

(*h*) See National Health Service Act, 1946, s. 35 (3).

(*i*) This alternative provision may be useful where, as is often the case, there are no assets of any value apart from the goodwill. It will, of course, involve deletion of the other provisions relating to options to purchase given to the partners on dissolution.

contained a partner who retires or is expelled under the provisions in that behalf hereinbefore contained shall not for a period of [5] years from the date of his retirement or expulsion within a radius of —— miles from the partnership surgery or consulting room at such date (or in case there shall not be any from the Senior Partner's residence)

(a) whether alone or in partnership with any other person or as assistant to any person engage in the practice of a general medical practitioner or any branch of medicine surgery or midwifery usually performed by such practitioners or perform any general medical services under the General Medical Service

(b) prescribe or perform any specialised treatment in medicine surgery or midwifery directly for or on the request of any patient who is not introduced to him by another medical practitioner

(c) be concerned or interested whether directly or indirectly and whether financially or otherwise in any competing professional business carried on within the area aforesaid

Provided that the covenant aforesaid shall not prevent a retiring or expelled partner from practising as a consultant physician or surgeon within such period and area (*k*).

Notices.

20. The provisions of section 196 of the Law of Property Act 1925 shall apply to all notices to be given under this Deed.

Arbitration clause.

21.—(1) If during the continuance of the partnership or at any time afterwards any dispute difference or question shall arise between the partners or their representatives touching the partnership or the accounts or transactions thereof or the determination or winding up thereof or the construction meaning or effect of this Deed or anything herein contained or as to the rights and liabilities of the partners or their representatives under this Deed or otherwise in relation to the premises such dispute difference or question shall be referred to a single arbitrator to be nominated by the President for the time being

(*k*) See *Routh* v. *Jones*, [1947] 1 All E. R. 758. The covenant appears to be saved by the proviso to s. 35 (6) of the National Health Service Act, 1946. The radius must be calculated having regard to the area actually covered by the plaintiff in his practice.

of the Royal College of Physicians [Surgeons] [two arbitrators one to be appointed by each party or their umpire]

(2) Either party may require that the question whether having regard to any change in the law relating to the General Medical Service it is just and equitable that the partnership be continued or dissolved or the terms thereof varied be referred to arbitration under this present provision and an award may in that event be made that the same shall so continue or be dissolved and in either case upon any terms

Definition clause.

22. In this Deed the expression "The General Medical Service" shall include any scheme providing general medical service (including surgical and specialist service) established for the public under the National Health Service Act, 1946 (as amended by the National Health Service (Amendment) Act 1949) or any statutory modification or re-enactment thereof for the time being in force "general medical services" shall mean general medical services performed under any such scheme and "Medical List" shall mean the appropriate Medical List prepared under the National Health Service (General Medical and Pharmaceutical Services) Regulations 1948 or other appropriate List under any Regulations for the time being in force in relation to the General Medical Service.

IN WITNESS, *etc.*

Form 7

Will of Married Man giving Life Interest to Wife and subject thereto to Children at twenty-five or Marriage. Power to raise Money in certain Contingencies for Wife and Children.

This precedent was drafted by Mr. Donald C. L. Cree of Lincoln's Inn

THIS is the Last Will of me A of *etc.* which I make this —— day of —— 19— hereby revoking all other wills and testamentary dispositions by me heretofore made.

Appointment of executors.

1. I appoint my wife B and C of *etc.* (hereinafter called "my Trustees") Executors and Trustees of this my Will.

Legacy to wife.

2. I bequeath to my said Wife the sum of £x to be paid to her as soon as practicable after my death in priority to all other bequests hereby or by any Codicil hereto made.

Bequest of chattels.

3. I bequeath to my said Wife during her widowhood the use and enjoyment of all my personal chattels as defined by the Administration of Estates Act 1925 (except such articles as from their trifling value or perishable nature my Trustees in their absolute and uncontrolled discretion shall consider unsuitable to be settled which excepted articles I give to my said Wife absolutely) she keeping the same properly insured against loss or damage by fire and burglary and in good repair and preservation reasonable wear and tear excepted And after her death or remarriage I bequeath the same to my son D And I declare that it shall not be obligatory on my Trustees to require any inventory thereof to be made and that my Trustees shall not be concerned to see to the insurance thereof or be liable for any loss or damage that may happen thereto from any cause whatsoever (*a*).

Devise and bequest of residue on trust for sale.

4.—(1) I devise and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall at my death be seised possessed or entitled or over which I shall then have a general power of appointment or disposition by Will (except property otherwise disposed of by this my Will or any Codicil hereto) unto my Trustees upon the trusts and with and subject to the powers and provisions hereinafter declared and contained concerning the same

(2) My Trustees shall sell call in collect and convert into money the said real and personal property at such time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my Trustees that an earlier sale would be beneficial) with power in their uncontrolled discretion to postpone the sale calling in or conversion of the whole or any part or parts of the said property during such period as they shall think proper and

(*a*) These provisions in lieu of the usual clauses requiring inventories, etc., may be found useful where the articles are of small and only sentimental value.

to retain the same or any part thereof in its actual form of investment without being responsible for loss

(3) The rents profits and income of such of my said real and personal property as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my Will.

Trust for payment of debts, etc.

5. My Trustees shall out of the moneys to arise from the sale of my said real estate and the calling in and conversion of such of my said personal property as shall not consist of money and out of any ready money pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate) and debts and the legacies bequeathed by this my Will or any Codicil hereto and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in this my Will or any Codicil hereto are payable out of any general personal estate and make provisions for the payment of any annuities hereby or by any Codicil hereto bequeathed by me and in relation to such payments and provisions the rule of equity called the rule in *Allhusen* v. *Whittell* shall be disregarded.

Trust for investment of proceeds.

6. My Trustees shall at their discretion invest the residue of the said moneys in or upon any of the investments hereby authorised with power to vary or transpose such investments for others of a nature hereby authorised.

Trusts of residue; for wife for life and then to children at 25.

7. My Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and such parts of my estate as shall for the time being remain unsold and unconverted (all of which premises are hereinafter referred to as "the Trust Fund") upon the trusts following that is to say:—

(1) My Trustees shall pay the income of the Trust Fund to my said Wife during her life so long as she shall remain my widow

(2) After the death of my said Wife or her remarriage my Trustees shall stand possessed of the capital and future income of the Trust Fund IN TRUST for all or any my children or child living at my death who attain the age of twenty-five years or marry under that age and the children or child then living of any then deceased child of mine who attain the age of twenty-one years or being female attain that age or marry under that age and if more than one in equal shares as tenants in common but so that the children of any deceased child of mine shall take equally between them as tenants in common only the share which their parent would have taken had he or she survived me and attained a vested interest

(3) If no child or grandchild of mine shall attain a vested interest under the trust lastly hereinbefore declared my Trustees shall hold the Trust Fund and the future income thereof IN TRUST for all or any the children or child of my deceased sister E who shall attain the age of twenty-one years or being female marry under that age and if more than one in equal shares

(4) The statutory powers of maintenance and advancement shall apply to the interests of all persons (other than my said Wife) beneficially interested hereunder.

8.—(1) I declare that at any time or times in any of the circumstances hereinafter mentioned my Trustees shall have power to raise (a) in the case of my said Wife any portion or portions not exceeding in the aggregate one moiety of the Trust Fund and (b) in the case of any child of mine any portion or portions not exceeding in the aggregate one moiety of his or her presumptive or vested share in the Trust Fund and pay or apply the same as my Trustees shall think fit for the benefit as the case may be of my said Wife or such child of mine PROVIDED that in no case shall more than one quarter of the Trust Fund in the case of my said Wife or one quarter of that child's share in the case of a child be so raised in any period of five consecutive years

(2) The circumstances in which the power aforesaid shall be exercisable are as follows:—

(a) In the event of severe illness or a serious operation or

when fees for special medical or surgical treatment or expenses in a nursing home or hospital or during convalescence are incurred

(b) In the case of a child when special educational facilities including residence at a University or training at any special College or Institute are required and such facilities cannot be otherwise provided and the withholding of them would in the opinion of my Trustees be detrimental to the child

(c) Such other special circumstances as my Trustees shall consider fitting for the exercise of such power (*b*)

(3) My Trustees shall also have power at any time or times at the request of my said Wife to raise out of the capital of the Trust Fund and pay to or for her benefit any sum or sums not exceeding in the aggregate the sum of £x (in addition to any portions of the Trust Fund advanced to her under the power lastly hereinbefore contained) for any purpose of which they shall approve and my Trustees shall not be responsible for seeing to the application thereof.

Power of investment.

9. Trust moneys may at the discretion of my Trustees be invested in the purchase of or at interest upon the security of such land or immovable property stocks funds shares securities and other investments of whatsoever nature and wheresoever and whether involving liability or not as my Trustees shall in their absolute discretion think fit to the intent that my Trustees shall have the same full and unrestricted power of investing and transposing investments (including investments in the purchase of freehold or leasehold property) in all respects as if they were absolutely entitled thereto beneficially and I expressly declare that the purchase of a freehold or leasehold house as a residence for a beneficiary is an authorised investment.

(*b*) The power to advance money to the children is made exercisable without the wife's consent. This will, it is thought, avoid a claim for estate duty on advances made within five years of her death. As the wife is appointed a trustee she appears to be sufficiently protected. The advantage of inserting such a power rather than a power of appointment to the wife, is that, in addition to avoiding possible claims for estate duty, stamp duty on a surrender of her life interest in sums appointed is saved.

Power of appropriation.

10. My Trustees as well in their capacity of personal representatives as Trustees may in extension of the power of appropriation conferred on personal representatives by section 41 of the Administration of Estates Act 1925 at any time or times at their sole and absolute discretion and without any of the consents made necessary by the said Act appropriate any part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of any legacy or any share in my residuary estate.

Power to determine questions.

11. My Trustees may conclusively determine what articles pass under any specific bequest in this my Will or any Codicil thereto and whether any moneys are to be considered as capital or income and whether any expenses and other payments ought to be paid out of capital or income and may determine all questions and matters of doubt arising in the execution of the trusts of this my Will or any Codicil thereto and every such determination shall be conclusive and binding on all persons claiming thereunder.

Power of solicitor trustee to charge.

12. Any Executor or Trustee being a solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in relation to the trusts hereof.

Power to appoint new trustees.

13. The power of appointing a new trustee or new trustees hereof shall be vested in my said Wife during her life.

IN WITNESS *etc.*

Form 8

Lease for Twenty-one years of a Shop by the Freeholder, to take effect in possession subject to an existing lease (*a*).

THIS LEASE made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Landlord" which expression shall where the context so admits include the estate owner or estate owners for the time being of the premises hereby demised immediately expectant on the term hereby granted) of the one part and B of *etc.* (hereinafter called "the Tenant" which expression shall where the context so admits include his executors administrators and assigns) of the other part. Parties.

WITNESSETH that in consideration of the rent hereinafter reserved and of the covenants on the part of the Tenant and the conditions and agreements hereinafter reserved and contained the Landlord hereby demises unto the Tenant ALL THAT messuage Demise. Parcels.

(*a*) This precedent is intended to cover the case, which it is believed not infrequently occurs, where the freeholder of premises let for a term which has only a few years to run, lets them to a third person at an increased rent for a term to commence at once and to be subject to the existing lease until this expires. The new tenant is assumed to be willing to pay during the residue of the existing term a higher rent than he will himself receive from the present tenant in consideration of being assured of the premises for his own occupation on its expiration. The assignment of the reversion for a term of years passes the legal right to enforce the covenants in the existing lease to the new tenant, and prevents the freeholder from suing for a subsequent breach. Care should therefore be taken to see that all the covenants in the existing lease are repeated in the new one, as the freeholders' remedy will be against the new tenant alone. The right to compensation for dilapidations at the end of the existing term will likewise pass to the new tenant. The new tenant will be the landlord for the purpose of claims for compensation for goodwill and improvements under the Landlord and Tenant Act, 1927, as he will be, as between himself and the existing tenant, the person entitled to the rents and profits of the demised premises at the determination of the lease, which is the material date. See s. 25 (1) and *Nuthall, Ltd.* v. *Entertainments and General Investment Corporation, Ltd.*, [1947] 2 All E. R. 384.

The new tenant, being a mesne landlord, will under s. 8 (1) have the right if a claim is made against him for compensation, to make a similar claim against the freeholder at the end of his own lease. His rights in this respect cannot be taken away by agreement. Consequently, it appears to be useless to insert a covenant by him to indemnify the freeholder against claims under the Act or to make any provision as to claims for a new lease. A general covenant by the new tenant to perform the covenants on the part of the landlord in the present lease and to indemnify the freeholder appears, however, to be desirable.

and shop yard and premises with the appurtenances situate and known as No. — —— Street in the parish of —— in the county of —— more particularly delineated on the plan hereto annexed and thereon coloured pink

Reservations of free passage of water;

Except and reserving unto the Landlord the free passage and running water and soil and other matter from and to the other adjoining buildings and land of the Landlord and his tenants through the drains and pipes now laid through or upon the demised premises (*b*) and

right to alter adjoining buildings.

Except and reserving also to the Landlord the right to rebuild or alter the elevation or otherwise of the adjoining or neighbouring buildings notwithstanding that the access of light and air to the demised premises may thereby be diminished

Habendum.

To hold the same unto the Tenant (subject to and with the benefit of a Lease dated the —— day of —— and made between the Landlord of the one part and —— of the other part so far as subsisting) for the term of twenty-one years from the —— day of —— next determinable as hereinafter provided

Reddendum.

Yielding and paying therefor during the said term the yearly rent of £X in respect of the demised premises by equal quarterly payments on the usual quarter days the first payment [being an apportioned sum] to be made on the —— day of —— next

Tenant's covenants:

And the Tenant hereby covenants with the Landlord in manner following that is to say:—

to pay rent;

(1) To pay the rent hereinbefore reserved at the times and in manner hereinbefore provided

to pay rates;

(2) To pay and discharge all present and future rates taxes duties assessments impositions outgoings and charges whatsoever whether parliamentary parochial local or of any other description which now are or may at any time hereafter be assessed charged or imposed upon or payable in respect of the demised premises or the owner or occupier in respect thereof Landlord's property tax only excepted

to repair;

(3) At all times during the said term to keep the said messuage and shop and all additions and fixtures which may at any time be erected or placed upon or affixed to the demised

(*b*) It is assumed that the shop and premises over it are let together. See note (*d*), *post*.

premises in good and tenantable repair (damage by fire act of God and inevitable accident excepted)

to paint inside;

(4) Once in every seven years of the term and in the last year thereof (whether determined by effluxion of time or by notice by either party under the provisions in that behalf hereinafter contained) to paint with two coats of good and proper oil paint paper with suitable quality paper grain varnish whitewash and colour all the inside parts of the demised premises usually painted grained varnished whitewashed and coloured and which the tenant is hereby required to keep in repair

to paint outside;

(5) Once in every three years of the said term and in the last year thereof (whether determined by effluxion of time or by notice by either party under the provision hereinafter contained) to paint the outside wood and iron [and stucco or cement work] of the said messuage and shop and all additions thereto with two coats of good and proper oil paint in a proper and workmanlike manner

to yield up in repair;

(6) At the expiration or sooner determination of the said term quietly to yield up the demised premises and all additions and improvements thereto and all fixtures of every kind in or upon the said premises or which during the said term may be affixed or fastened to or upon the same in the same good and tenantable repair (but subject to the same proviso) in which the tenant is hereinbefore required to keep the same [except tenant's or trade fixtures]

to allow landlord to enter and view;

(7) To permit the Landlord and all persons authorised by him to enter upon the demised premises or any part thereof at all reasonable times to inspect the condition thereof and of all defects decays or wants of reparation then and there found and which the Tenant shall be liable to make good under the covenants hereinbefore contained to give or leave notice on the demised premises And within the space of two calendar months after such notice to repair and amend the same according to such notice and covenants

to permit landlord to repair in default;

(8) That if the Tenant shall make default in complying with any such notice as aforesaid or on the performance of any of the covenants for or relating to repair or decoration hereinbefore contained it shall be lawful for the Landlord

(but without prejudice to the right of re-entry hereinafter contained) to enter upon the demised premises and execute the requisite repairs decorations and work at the expense of the Tenant in accordance with the covenants and provisions herein contained and the Tenant shall on demand repay to the Landlord the expenses of such repairs decorations and work

not to alter or carry out development or change of use;

(9) Not without the written consent of the Landlord first obtained at any time during the said term to make or suffer to be made any alterations or additions (*c*) to the demised premises either internally or externally or to cut or injure any of the outside or inside walls floors or joists or to carry out or suffer to be carried out any development (including material change in the use of the demised premises) within the meaning of the Town and Country Planning Act 1947 or any statutory modification or re-enactment thereof for the time being in force or to display or suffer to be displayed on the exterior or in the interior of the demised premises any advertisement within the meaning of the said acts or any regulations for the time being in force thereunder

to apply for planning permission;

(10) If the Landlord shall give such permission as is mentioned in the preceding covenant in respect of any matter for which the consent of the local planning authority shall be required forthwith at the Tenant's own expense duly to apply to such authority therefor and to pay or give proper security for the payment of any development charge leviable in respect thereof and not to commence to carry out such development until he shall have obtained and produced to the Landlord such permission and also the Certificate of the Central Land Board that any development charge has been paid or secured to the satisfaction of the Central Land Board or that no development charge is payable

not to contravene planning Acts;

(11) Not to do or omit or suffer to be done or omitted any matter in contravention of the statutes statutory instruments rules orders and regulations for the time being in force relating

(*c*) The covenant should, it is thought, having regard to the extension of the class of development permitted without licence by the General Development Orders, cover a wider class of alteration than that for which planning permission is necessary.

to planning control or any orders directions or notices made or given thereunder and in particular to comply with the conditions attached to any permission for development given or to be given in relation to the demised premises and at all times (without prejudice to the statutory indemnity in that behalf) to indemnify and keep indemnified the Landlord against all actions proceedings costs expenses claims and demands in respect thereof

to pass on notices to landlord;

(12) Forthwith to deliver to the Landlord a copy of any notice served upon him or any sub-tenant and of any order or proposed order affecting the demised premises and to take all reasonable steps to comply with such notice and also at the request and cost of the Landlord to make or join with the Landlord in making such objections representations or appeals in respect thereof as the Landlord may reasonably require

to use only for specified trade;

(13) Not without the previous consent in writing of the Landlord to carry on or suffer to be carried on on the demised premises or any part thereof any trade or business whatsoever other than that of a ——

not to commit nuisance;

(14) Not to do or suffer to be done on the demised premises any act or thing which in the opinion of the Landlord may be or grow to be a nuisance annoyance or damage to the Landlord or his tenants or the owners or occupiers of adjoining or neighbouring premises

to insure;

(15) To insure and keep insured against loss or damage by fire [and aircraft] the said messuage and shop and all additions thereto and fixtures of an insurable nature which at any time during the said term may be placed upon or affixed to the demised premises to the full value thereof in the —— Insurance Office or in some other insurance office or with underwriters of repute to be approved in writing from time to time by the Landlord in the name of the Landlord [and also to insure and keep insured against loss or damage by accident or otherwise all plate glass windows in the said shop to the full value thereof in the said —— Insurance Office or such other office as aforesaid] and duly and punctually to pay all premiums or other money necessary for effecting and keeping up such insurance immediately on the same

becoming due or within one week thereafter and produce to the Landlord or his agent whenever required the policy of such insurances and the receipt for the last premium thereof And that in case the said messuage and shop and premises or any part thereof shall at any time during the said term be destroyed or damaged by fire [or aircraft] then and as often as the same shall happen all moneys received in respect of such insurance shall with all convenient speed be laid out in rebuilding repairing or otherwise reinstating the same premises in a good and substantial manner under the direction of the Landlord's surveyor [and that the Tenant will pay the fees of such surveyor]

PROVIDED that in default of the Tenant effecting and maintaining such insurances as aforesaid the Landlord may (without prejudice to the power of re-entry hereinafter contained) insure the said premises [and windows] in manner aforesaid and pay the said premiums payable in respect thereof and all incidental expenses shall be repaid by the Tenant to the Landlord on demand

to permit landlord to repair adjoining premises;

(16) To permit the Landlord and any persons authorised by him at any time or times during the said term during reasonable hours and on reasonable notice in the daytime to enter the demised premises for executing [necessary] repairs alterations and amendments of or upon the adjoining or neighbouring premises or to the drains and wires thereof and to take schedules or inventories of the fixtures and things to be yielded up at the expiration of the said term making good all damage thereby occasioned [to the demised premises] (*d*)

to contribute to cost of repairing party walls, etc.;

(17) To contribute a due proportion of the expenses of making repairing rebuilding maintaining and cleansing all party walls drains sewers roads pavements or other conveniences which shall during the said term belong to or be used in common

(*d*) See *Greg* v. *Planque*, [1936] 1 K. B. 669. The words in square brackets are essential if it is desired to exclude damage to the stock. This precedent is only intended to apply where the shop and premises over it are let together. If the shop forms only part of the building, and is let separately, it will require modification, *e.g.*, this covenant should extend to repairs to the parts of the building excepted from the lease and the wiring, drainage, etc., therein. Also a covenant against doing anything to increase the premium on the insurance of the building will be required, if the landlord covenants to insure the whole building.

by the demised premises and any adjoining or neighbouring premises such proportion in case of difference to be settled by the surveyor for the time being of the Landlord whose decision shall be final and to be paid to the Landlord on demand

to permit landlord to put up board for reletting;

(18) To permit the Landlord or his agent within three calendar months of the expiration or sooner determination of the term to enter upon the demised premises and to affix on any suitable part thereof a notice board for reletting the same and not to remove or obscure the same and to permit all persons by order in writing of the Landlord or his agent to view the demised premises at reasonable hours in the daytime without interruption

not to hold auction;

(19) Not to use or permit the demised premises to be used for the purpose of holding an auction

to pay costs of application for possession;

(20) To pay to the Landlord all costs charges and expenses (including legal costs and surveyors' fees) which may be incurred by the Landlord of and incidental to the preparation and service of a notice under section one hundred and forty-six of the Law of Property Act 1925 or any statutory modification or re-enactment thereof for the time being in force notwithstanding that forfeiture is avoided otherwise than by relief granted by the Court.

not to assign;

(21) Not to assign underlet or part with the possession of the demised premises or any part thereof without the consent in writing of the Landlord such consent not to be unreasonably refused

to perform covenants in existing lease.

(22) To perform and observe as from the —— day of —— next (*e*) the covenants and agreements on the part of the Landlord and conditions contained in the said Lease dated the —— day of —— and to save harmless and keep indemnified the Landlord and his estate and effects against the same and all actions proceedings costs claims and expenses for or in respect of any breach of the said covenants agreements and conditions.

Landlord's covenant for quiet enjoyment.

AND THE Landlord hereby covenants with the Tenant that the Tenant paying the rent hereby reserved and observing and performing the covenants conditions and agreements herein contained and on his part to be performed and observed may peaceably and quietly enjoy the demised premises without any interruption or disturbance by the Landlord or any person claiming under or in Trust for him [or by title paramount].

(*e*) This will be the commencement of the term of the new lease.

Proviso for re-entry.

PROVIDED ALWAYS and this Lease is upon the express condition that if the rent hereby reserved or any part thereof shall at any time be in arrear and unpaid for fourteen days or upwards (whether the same shall have been legally demanded or not) or if the Tenant at any time fail or neglect to observe or perform any of the covenants conditions and agreements herein contained and on the part of the Tenant to be performed and observed or if the Tenant shall become bankrupt or make any arrangement or composition with his creditors or permit any execution to be levied on the demised premises or if the assigns of the Tenant being a company shall enter into liquidation whether voluntary or compulsory (not being a voluntary liquidation for the purpose of amalgamation or reconstruction) then and in such event the Landlord may re-enter upon the demised premises or any part thereof in the name of the whole and thereupon the term hereby created shall cease and determine without prejudice to the rights and remedies of the Landlord in respect of any antecedent breach of the covenants conditions and agreements on the part of the Tenant herein contained.

Power to either party to determine lease.

PROVIDED also and it is hereby agreed that if either the Tenant or the Landlord shall be desirous of determining this lease at the expiration of the first —— years of the term hereby granted and of such desire shall give —— calendar months' notice in writing (of which service in accordance with the provisions of section one hundred and ninety-six of the Law of Property Act 1925 shall be sufficient) to the other of them and in the case of the Tenant shall pay the rent and perform and observe all the covenants conditions and agreements hereinbefore reserved and contained and on the part of the Tenant to be paid performed and observed up to such determination then and in such case immediately after the expiration of the first —— years of the said term this present lease and everything herein contained shall cease and be void without prejudice to any claim right or remedy by either party against the other in respect of any antecedent breach of any covenant condition or agreement herein contained.

IN WITNESS, *etc.*

Form 9

Confirmatory Appointment of a Bank as Trustee of the Estate of an Intestate, where the Bank has Completed Administration under a Grant of Letters of Administration as Attorney for the Widow (*a*).

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Widow") of the one part and the —— Bank Ltd. whose registered office is situate at —— in the County of —— (hereinafter called "the Bank") of the other part. Parties.

WHEREAS:— Recitals:

(1) X late of —— in the County of —— (hereinafter called "the Intestate") died on the —— day of —— 19— intestate and on the —— day of —— 19— Letters of Administration to his estate were granted to the Bank out of the —— Probate Registry as the lawful attorney of the Widow for her use and benefit until she should apply for and obtain letters of administration of the said estate death of intestate;

(2) The Intestate left him surviving two children only *viz.* —— and —— who are infants and unmarried and with the Widow are the only persons entitled to share in his estate. state of family;

(3) The Bank has paid the funeral testamentary and administration expenses debts and other liabilities of the Intestate and the duties payable on his death and has paid to the Widow the net sum of £1,000 and interest thereon from the death of the Intestate to which she is entitled under the Administration of administration;

(*a*) It is the duty of the attorney to administer the estate and pay over the balance to the next-of-kin, and the bank could not get a good receipt by paying the balance to the widow as principal: see *Re Rendell*, [1901] 1 Ch. 230.

But when the estate is cleared it appears that it would hold the residuary estate as defined by the Administration of Estates Act, 1925, on trust for the next-of-kin under the principle of *Re Ponder*, [1921] 2 Ch. 29, if it cannot be distributed, *e.g.*, because there is a subsisting life tenancy or infants are entitled. A confirmatory appointment is thus probably unnecessary, but it is believed that banks usually require one as authority to continue acting in the trust. An administrator holds the estate as administrator on trust for sale for purposes of administration, but when this is completed holds it as trustee on trust for sale; an assent in his own favour is therefore proper: *Re Yerburgh*, [1928] W. N. 208. Cf. *Re Wilks*, [1935] Ch. 645.

Estates Act 1925 and has disposed on her behalf of the personal chattels as defined by the same Act and paid or accounted to her for the proceeds of sale thereof (as she hereby admits and acknowledges)

property representing estate;

(4) The estate of the Intestate is now represented by the real estate specified in the First Part of the Schedule hereto and the investments and cash specified in the Second Part of such Schedule standing in the name of the Bank

accounts;

(5) The Bank has accounted to the Widow for the due administration of the estate of the Intestate

desire to retire and appoint bank;

(6) The Widow is desirous (if and so far as she may be a trustee thereof) of being discharged from the trust for sale affecting the said real estate under the Administration of Estates Act 1925 and the trusts affecting the residuary estate of the Intestate as defined in the same Act and by way of confirmation of appointing the Bank to be trustee of the same trusts in her place

assent of freeholds.

(7) By an Assent in writing bearing even date herewith but executed before these presents the Bank assented to the vesting in itself of the said real estate specified in the First Part of the said Schedule upon the trust for sale affecting the same under the Administration of Estates Act 1925.

NOW THIS DEED WITNESSETH as follows:—

Appointment of bank.

1. In exercise of the power in that behalf conferred by the Trustee Act 1925 and of every and any other power her hereunto enabling the Widow by way of confirmation and if and so far as she has power so to do hereby appoints the Bank to be trustee of the trust for sale affecting the said real estate comprised in the said Assent and of the trusts affecting the residuary estate of the Intestate under the Administration of Estates Act 1925 in the place of herself the Widow who hereby (if and so far as she may be a trustee thereof) retires from the same trusts.

Vesting declaration.

2. The parties hereto hereby declare that it is their intention that the statutory vesting declaration shall so far as applicable be implied herein under section 40 of the Trustee Act 1925 but shall not extend to the real estate comprised in the said Assent.

IN WITNESS *etc.*

THE SCHEDULE ABOVE REFERRED TO.

PART I

[*Particulars of real estate remaining unsold.*]

PART II

[*Particulars of investments and cash.*]

Form 10

Appointment of New Trustees by the Administrators of an Intestate who have Completed Administration of his Estate

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Appointors") of the one part and C of *etc.* and D of *etc.* (hereinafter called "the New Trustees") of the other part. Parties.

WHEREAS:— Recitals:

(1) X late of —— in the County of —— (hereinafter called "the Intestate") died intestate on the —— day of —— 19— and on the —— day of —— 19— Letters of Administration to his estate were granted to the Appointors out of the —— Probate Registry death and grant of administration;

(2) The Intestate left him surviving two children only *viz.* —— and —— who are infants and unmarried and with his Widow the said A are the only persons entitled to share in his estate state of family;

(3) The Appointors have paid the funeral testamentary and administration expenses debts and other liabilities of the Intestate and the duties payable on his death and have paid to the said A the net sum of £1,000 and interest thereon from the death of the Intestate to which she is entitled under the Administration of Estates Act 1925 and have transferred to her the personal chattels as defined by the same Act administration of estate;

(4) The estate of the Intestate is now represented by the real estate specified in the First Part of the Schedule hereto and property forming estate;

the investments and cash specified in the Second Part of such Schedule

assent of freeholds;

(5) By an Assent in writing dated the —— day of —— 19— the Appointors assented to the vesting in themselves of the said real estate upon the trust for sale affecting the same under the Administration of Estates Act 1925

desire to appoint new trustees;

(6) The Appointors are desirous of being discharged from the trusts affecting the proceeds of sale of the said real estate and the trusts affecting the other residuary estate of the Intestate as defined in the same Act and of appointing the New Trustees to be trustees of such trusts in their place

(7) It is intended that by an appointment bearing even date herewith and made between the same parties the New Trustees shall be appointed trustees of the said real estate and the trust for sale affecting the same comprised in the said Assent in the place of the Appointors (*a*)

transfer of investments.

(8) It is intended that the Appointors shall after the execution hereof transfer into the joint names of the New Trustees the net residue of the said investments and cash specified in the Second Part of the said Schedule after raising and paying thereout the costs of and incidental to the preparation and execution of this Appointment.

NOW THIS DEED WITNESSETH as follows:—

Appointment.

1. In exercise of the power in that behalf conferred by the Trustee Act 1925 and of every and any other power them hereunto enabling the Appointors hereby appoint the New Trustees to be trustees of the proceeds of sale of the said real estate comprised in the said recited Assent and of the trusts affecting the other residuary estate of the Intestate under the Administration of Estates Act 1925 in the place of themselves the Appointors who hereby retire from the same trusts.

Vesting declaration.

2. The parties hereto hereby declare that it is their intention that the statutory vesting declaration shall be implied herein under section 40 of the Trustee Act 1925 but shall not apply to the real estate to which the said Assent relates.

IN WITNESS, *etc.*

(*a*) See Form No. 11.

THE SCHEDULE ABOVE REFERRED TO.

PART 1

[*Particulars of real estate remaining unsold.*]

PART 2

[*Particulars of investments and cash.*]

Form 11

Appointment of New Trustees of an Assent on Trust for Sale by the Administrators of an Intestate (*a*)

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* and B of *etc.* (hereinafter called "the Appointors") of the one part and C of *etc.* and D of *etc.* (hereinafter called "the New Trustees") of the other part. Parties.

WHEREAS:— Recitals:

(1) X late of —— in the county of —— died intestate on the —— day of —— 19— and on the —— day of —— 19— Letters of Administration to his estate were granted to the Appointors out of the —— Registry death of intestate;

(2) By an Assent in writing dated the —— day of —— 19— the Appointors assented to the vesting in themselves of the assent;

(*a*) This Precedent is intended to be used in connection with Form No. 10. It may be convenient to have a separate appointment of new trustees of the Assent in order to keep the trusts off the title, and to enable the appointment to be handed over to a purchaser of the whole property, the trustees retaining the appointment relating to the proceeds of sale and personalty. A separate appointment appears, however, not to be essential, as there is no separate "settlement" of the proceeds of sale and consequently s. 35 (1) of the Trustee Act, 1925, does not apply. If the assent is made on the trust for sale created by the Administration of Estates Act, and does not create a new trust for sale, this is clearly so, as the Act declares both the trusts of the land and of the proceeds of sale. In the case of small estates the two appointments may, it is thought, well be contained in one deed in order to save expense. A memorandum of the names of the new trustees should be endorsed on the Assent.

freehold property therein described upon the trust for sale affecting the same under the Administration of Estates Act 1925

desire to appoint.

(3) The Appointors are desirous of being discharged from the trust for sale affecting the said freehold property and of appointing the New Trustees to be trustees of such trust in their place.

Appointment in place of retiring trustees

NOW THIS DEED WITNESSETH that in exercise of the power in that behalf conferred by the Trustee Act 1925 and of every and any other power them hereunto enabling the Appointors hereby appoint the New Trustees to be trustees of the said freehold property comprised in the said Assent and of the trust for sale affecting the same in the place of themselves the Appointors who hereby retire from the same trusts.

IN WITNESS *etc.*

Form 12

Appointment by a Widow under a Power in her Marriage Settlement of a share to an Improvident Son with his concurrence, to vest at 35 on Protective Trusts and with Power for the Trustees to pay over the whole share (*a*).

Parties.

THIS APPOINTMENT is made the —— day of —— 19— BETWEEN A of *etc.* Widow (hereinafter called "the Appointor") of the

(*a*) It is frequently desired to appoint a share on protective trusts. This cannot be done under the ordinary power of appointment. Although a gift over on alienation would be valid the discretionary trust on forfeiture would amount to a delegation of the power; as would also a power for the trustees to pay over the whole share before the child attains a vested interest. See *Re Joicey*, [1915] 2 Ch. 115; *Re Boulton's Settlement*, [1928] Ch. 703. The statutory protective trusts could not in any case be used as the child's wife or husband would be an object of the discretionary trust on forfeiture. Further, where, as under a marriage settlement, the child was not born at the date of the creation of the power, his interest cannot be made to vest, or a discretionary trust to continue more than 21 years after the appointment. It is possible to make the appointment on protective trusts, as in this Precedent, with the child's concurrence, if over 21, as this amounts to an appointment to him of an absolute interest and a settlement by him of his share. There is, however, the objection that the forfeiture provisions would probably not be effective as against his creditors, and that *ad valorem* stamp duty may be claimed as on a settlement by him of his share.

An alternative form applicable to appointments without the child's concurrence under powers in wills is given in the next Precedent.

1st part B of *etc.* (hereinafter called "the Son") of the 2nd part and C of *etc.* and D of *etc.* (hereinafter called "the Trustees") of the 3rd part.

WHEREAS:— Recitals:

(1) This Appointment is supplemental to a settlement (hereinafter called "the Settlement") dated *etc.* and made between *etc.* being a Settlement made in consideration of the marriage then intended and shortly afterwards duly solemnized between E and the Appointor settlement;

(2) The Trustees are the present trustees of the Settlement present trustees;

(3) The said E died on the —— day of —— 19— without having joined with the Appointor in exercising the joint power of appointment in favour of the children of the said marriage conferred on them by the Settlement death of husband;

(4) The Appointor is desirous of making such appointment in favour of the Son and F and G (children of the said marriage of the Appointor and the said E) as is hereinafter contained. desire to appoint.

NOW THIS DEED WITNESSETH as follows:— Appointment of one-third share.

In exercise of the power in that behalf conferred on her by the Settlement as having survived the said E and of all other powers and by the direction (hereby testified) of the Son the Appointor hereby irrevocably appoints that one equal third share of the investments and property now subject or which may by any means become subject to the trusts of the Settlement shall from and after her death and in the meantime subject to her life interest therein be held by the Trustees or other the trustees or trustee for the time being of the Settlement upon the trusts and with and subject to the powers and provisions following that is to say—

(1) IN TRUST for the Son absolutely if he shall attain the age of 35 years and the trust for payment of the income to him next hereinafter contained shall not have been determined on the day on which he attains that age Trusts: for son at 35 if he has not alienated;

(2) If the Son shall not attain a vested interest in the capital of the said share under the trust lastly hereinbefore declared IN TRUST for all or any the children or child of the Son (or in the on failure for his children or in default for the appointor's other children;

event of the Son attaining the age of 35 years but failing to attain a vested interest for all or any the children or child of the Son living at the date when he attains that age) who attain the age of 21 years or being female marry under that age and if more than one in equal shares but if there shall be no child of the Son who attains a vested interest then IN TRUST for the said F and G in equal shares absolutely

alienation; to pay income to him until

(3) IN TRUST to pay the income of the said share to the Son until he attains the age of 35 years or previously dies or until (whether before or after the Appointor's death) he does or attempts to do or suffers any act or thing or any event happens whereby if the said income were payable to him absolutely during the period aforesaid he would be deprived of the right to receive the same or any part thereof

discretionary trust on forfeiture;

(4) From and after the determination of the trust hereinbefore declared for payment of the income to the Son UPON TRUST until the Son attains 35 years or previously dies to pay or apply the same income to or for the benefit of the Son [and any children of the Son for the time being in existence] and the said F and G or one or more exclusively of such persons as the Trustees or other the trustees or trustee of the Settlement shall in their discretion think fit

trustees' indemnity;

(5) The Trustees or other the trustees or trustee for the time being of the Settlement shall not be liable or responsible for paying the said income to the Son or permitting him to receive the same after the determination of the trust hereinbefore declared of such income in his favour unless and until they shall have received express notice of the act or event causing such determination

power to pay over share;

(6) The Trustees or other the trustees or trustee of the Settlement may in their absolute discretion at any time or times after the death of the Appointor [or during her life with her consent in writing] pay or transfer the whole or any part or parts of the capital of the share hereinbefore appointed to the Son for his own use and benefit before he attains the age of 35 years

(7) The appointment hereby made shall not prejudice or affect the power of varying investments or the power of advancement contained in the Settlement in relation to the share hereinbefore appointed. powers in settlement to remain.

IN WITNESS *etc.*

Form 13

Appointment by Widow under a Power in her Father's Will of a share to her son to vest at 25 Contingently on his not having Alienated his Interest in Capital or Income (*a*).

THIS APPOINTMENT made BY A of *etc.* (hereinafter called "the Appointor")

WITNESSETH that in exercise of the power in that behalf conferred on her by the will of her late father X (who died on the —— day of —— 19— and whose said will was proved on the —— day of —— 19—) and of all other powers the Appointor hereby irrevocably appoints that one equal third part of the proceeds of sale of the residuary estate of the said X and the investments and property from time to time representing the same shall be held upon the trusts and subject to the provisions following that is to say:— Appointment to son.

(1) IN TRUST for B (the son of the Appointor and who was born in the lifetime of the said X and is hereinafter called "the Trusts: for son if he attains 25 and has not alienated;

(*a*) See notes to last Precedent. Notice in writing of the appointment should be given to the trustees of the will. It is assumed that the son was born in his grandfather's lifetime, otherwise the appointment would offend against the perpetuity rule unless the son was 4 years old. Such an appointment by a parent under a power in a marriage settlement would be good if the son had already attained the age of 4 years (*Re Paul*, [1921] 2 Ch. 1). A power for the trustees to pay over the share before the son attains 25 would not be within an ordinary power of appointment. This objection could, however, if desired be got over by making the appointment with the concurrence of the other children to whom the property is appointed if his interest fails. The method adopted in this Precedent is not wholly satisfactory as the son loses his interest altogether on bankruptcy or alienation and the trustees cannot pay him an allowance. Provision must of course be made for payment of the income after forfeiture to other objects of the power. The last Precedent may be used if preferred, but this again is open to objections of another character.

Son ") if he shall attain the age of 25 years and the trust for payment of the income to him next hereinafter contained shall be subsisting on the day on which he attains that age

to pay income to him until he alienates;

(2) IN TRUST to pay the income of the said share to the Son until he attains the age of 25 years or previously dies or until he does or attempts to do or suffers any act or thing or until any event happens whereby if the same income were payable to him absolutely during the period aforesaid he would be deprived of the right to receive the same or any part thereof

for other children if his interest fails;

(3) If the Son shall die under the age of 25 years or the trust hereinbefore declared for the payment of the income to him shall not be subsisting on the day on which he attains that age IN TRUST for C and D (children of the Appointor) in equal shares absolutely (*b*)

to pay income to other children on alienation;

(4) From and after the determination of the trust hereinbefore declared for payment of the said income to the Son UPON TRUST until the Son attains the age of 25 years or previously dies to pay the same to the said C and D in equal shares

trustees' indemnity;

(5) The Trustees for the time being of the said will of the said X shall not be liable or responsible for paying the said income to the Son or permitting him to receive the same after the determination of the trust hereinbefore declared of such income in his favour unless and until they shall have received express notice of the act or event causing such determination

proviso for revesting.

(6) If on any date after the determination of the trust hereinbefore declared for payment of the income of the said share to the Son the whole of such income if hereinbefore made payable absolutely to him during the period aforesaid would again belong to and be payable to him alone during the residue of the said period for his own absolute use and benefit free from incumbrances the income accruing after such day shall be held upon the trusts (including the provision determining the trusts in his favour of such income) upon which the same would for the time being be held if the trusts thereof had not determined

(*b*) If the power is to appoint to issue, the son's children may be substituted if he dies under 25, as in the last Precedent.

(7) Nothing herein contained shall prejudice or affect the power of varying investments in the said will in relation to the share hereinbefore appointed.

IN WITNESS *etc.*

Form 14

Settlement by Husband of Freehold House and Furniture on his Wife and Children

1. CONVEYANCE ON TRUST FOR SALE OF HOUSE

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Settlor") of the first part B the Wife of the Settlor (hereinafter called "the Wife") of the second part and the Settlor and C of *etc.* (hereinafter collectively referred to as "the Trustees") of the third part. Parties.

WHEREAS:—

(1) The Settlor is the estate owner of the fee simple free from incumbrances of the property intended to be hereby assured Recitals: seisin;

(2) The Settlor is desirous of settling the said property for the benefit of his Wife and children in manner hereinafter appearing. desire to settle.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for his Wife and children witnesseth and IT IS HEREBY AGREED AND DECLARED as follows:—

1. The Settlor AS SETTLOR hereby conveys unto the Trustees ALL THAT *etc.* Conveyance. Parcels.

TO HOLD UNTO the Trustees in fee simple UPON TRUST that they shall with the consent in writing of the Wife during her life sell the same or any part thereof with power to postpone such sale and shall hold the net proceeds of any such sale (after payment of costs) and of the net rents and profits of such part of the same property as shall for the time being remain unsold (after payment of outgoings). Habendum.

Upon the Trusts and with and subject to the powers and provisions declared and contained concerning the same in a settlement already prepared and intended to bear even date

herewith and to be made between the same persons who are parties to this conveyance and in the same order.

Additional power to mortgage.

[2. During the life of the survivor of the Trustees and of the issue now living of His late Majesty King George V and twenty-one years after the death of such survivor the Trustees or other the Trustees or Trustee for the time being of this Conveyance may by way of extension of the powers conferred on them by statute raise money by mortgage for any purpose for which they can apply capital money and the provisions of section seventeen of the Trustee Act 1925 shall apply for the protection of the mortgagee.]

Power to appoint new trustees.

3. The power of appointing a new trustee or new trustees of the Conveyance shall be vested in the Settlor and the Wife during their joint lives and in the survivor during the residue of his or her life.

Limitation of liability under covenants for title.

[4. The covenant implied herein by the Settlor conveying and being expressed to convey as Settlor shall not render him or any person deriving title under him liable to discharge or get in any incumbrance or estate not created by the Settlor or any such person.] (*a*)

Certificate as to value.

[5. It is hereby declared and certified that the transaction hereby effected does not form part of a larger transaction or of a series of transactions in respect of which the amount or value or the aggregate amount or value of the property conveyed or transferred exceeds [£500] [£1500].] (*b*)

In witness, *etc.*

2. Settlement of the Proceeds of Sale and Furniture

Parties.

This Settlement is made the —— day of —— 19— between A of *etc.* (hereinafter called "the Settlor") of the first part B the Wife of the Settlor (hereinafter called "the Wife") of the second part and the Settlor and C of *etc.* (hereinafter collectively referred to as "the Trustees") of the third part.

(*a*) This clause may be desirable if the title is not fully gone into before the settlement.

(*b*) When the value exceeds £1,500 but does not exceed £1,950 a certificate that the transaction does not form part of a larger transaction or of a series of transactions should be substituted.

WHEREAS:— Recitals:

(1) By a Conveyance (hereinafter called "the Conveyance") bearing even date with but executed before this Settlement and made between the same parties who are parties to this Settlement and in the same order a certain freehold messuage or tenement with the grounds and appurtenances situate at —— in the county of —— and therein more particularly described was conveyed to the Trustees in fee simple upon trust with the consent in writing of the Wife to sell the same or any part thereof with power to postpone such sale and to hold the net proceeds of sale (after payment of costs) and the net rents and profits of such part of the same property as should for the time being remain unsold (after payment of outgoings) upon the trusts and subject to the powers and provisions declared concerning the same by a settlement therein referred to being this Settlement conveyance of even date;

(2) The Settlor is also desirous of settling the furniture and effects hereinafter mentioned in manner hereinafter appearing. desire to settle furniture.

NOW THIS DEED made in consideration of the natural love and affection of the Settlor for his Wife and children WITNESSETH and it is hereby agreed and declared as follows:—

1. (1) The Settlor hereby assigns unto the Trustees ALL AND SINGULAR the furniture plate and other articles and effects of household or domestic use or ornament which are now in or about the said messuage or tenement comprised in the Conveyance [or the outbuildings gardens or grounds thereof] (all of which are hereinafter referred to as the said chattels) UPON THE TRUSTS and subject to the powers and provisions hereinafter declared and contained concerning the same (*c*) Assignment of furniture to trustees.

(2) The Trustees shall permit the Wife during her life to use and enjoy the said chattels and after her death may at their discretion during the minority of any child or children of the Settlor and the Wife permit the guardian of such child or any Wife to have use of furniture for life.

(*c*) The settlement will pass the legal title in the chattels to the trustees. Even if the settlor continues to reside in the house, the apparent possession would be in the wife and the settlement appears not to require registration as a bill of sale; anyhow, it would be valid as between the parties. See *Re Magnus*, [1910] 2 K. B. 1049; *French* v. *Gething*, [1922] 1 K. B. 236.

person nominated by such guardian to have the use and enjoyment of the said chattels or any of them for the benefit of all or any of the children and issue of the Settlor and the Wife

Power of sale.

(3) The Trustees may at any time but with the consent in writing of the Wife during her life sell the said chattels or any of them and apply the net proceeds either in the purchase of other chattels of a like nature or by investing the proceeds in any of the investments hereinafter authorised and the chattels so purchased or the investments so made and the income thereof shall be held upon the same trusts and subject to the same provisions as are hereby declared concerning the said chattels so far as the same are applicable

Inventory to be made.

(4) Inventories of the said chattels and of any chattels purchased under the power aforesaid shall from time to time be made in duplicate and one copy shall be signed by the Wife or by or on behalf of the persons in possession thereof and retained by the Trustees and the other copy shall be signed by the Trustees and retained by the Wife or such persons as aforesaid.

Insurance.

(5) The said chattels and any chattels so purchased as aforesaid shall be insured and kept insured against loss or damage by fire in such a sum as the Trustees shall from time to time determine and the Wife shall be liable to pay or repay to the Trustees the cost of keeping up such insurance and of making such inventories during her life

Trustees' indemnity for loss.

(6) The Trustees shall not be bound to see to the preservation of the said chattels and any chattels purchased as aforesaid or be liable for loss or damage thereto except to require such insurance as aforesaid to be kept up and such inventories as aforesaid to be made and signed but the Trustees may take such measures as they think fit for preserving the same including the removal thereof from the said messuage or tenement and warehousing them

(7) Subject as hereinbefore expressly provided the said chattels shall be held upon the trusts and with and subject to the powers and provisions hereinafter declared concerning investments representing proceeds of sale arising under the trust

for sale in the Conveyance so far as the same are applicable thereto.

2. The Trustees shall hold the net moneys to arise from any sale made under the recited trust for sale in the Conveyance of the property thereby assured or any part thereof UPON TRUST to invest the same when received and any other capital moneys which may be received by the Trustees in the names of the Trustees in or upon any of the investments hereinafter authorised with power at their discretion to vary such investments for others of a like nature. Trust to invest proceeds of sale of land.

3. The Trustees shall hold the said net moneys to arise from any such sale as aforesaid and any such capital money as aforesaid and the investments for the time being representing the same respectively (which moneys and investments are hereinafter called the "Trust Premises") and the income thereof and the net rents and profits of the unsold portion for the time being of the said property assured by the Conveyance (which rents and profits are hereinafter deemed to be included in the income of the Trust Premises) upon the Trusts and with and subject to the powers and provisions following that is to say Trusts of investments;

(1) The Trustees shall pay the income thereof to the Wife during her life for wife for life;

(2) After the death of the Wife the Trustees shall stand possessed of the capital and future income of the Trust Premises IN TRUST for the children or remoter issue of the Settlor and the Wife or for some or one of them at such ages or times (so far as the rule against perpetuities will permit) and in such shares (if more than one) and for such interests and upon such trusts for their respective benefit and with such provisions for their maintenance advancement education or benefit at the discretion of any person or persons and generally in such manner as the Settlor shall from time to time by deed revocable or irrevocable or by will or codicil appoint And in default of and subject to any such appointment IN TRUST for all or any the children or child of the Settlor and the Wife who being male attain the age of twenty-one years or being female attain that age or marry under that age after her death for children; as settlor appoints. In default for children at twenty-one or marriage.

Hotchpot clause.

(3) No child who or whose issue takes any part of the Trust Premises under any appointment made under any of the powers hereinbefore contained shall in the absence of a contrary intention expressed in such appointment be entitled to any share in the unappointed part except upon bringing the share or shares appointed to him or her or to his or her issue into hotchpot and accounting for the same accordingly

Maintenance and advancement.

(4) The statutory powers of maintenance and advancement shall apply to this Settlement

Ultimate trust.

(5) If there shall be no child of the Settlor and the Wife who shall attain a vested interest under the trust hereinbefore declared then subject to any exercise of the powers incorporated herein by reference or by law conferred on the Trustees the capital and income of the Trust Premises shall be held IN TRUST for the Settlor absolutely (*d*).

Wife to pay outgoings on house.

4. The Wife shall so long as she shall reside in the said messuage or tenement keep the same in good and substantial repair to the satisfaction of the Trustees and shall pay the rates taxes and other outgoings payable in respect thereof including the costs of insuring the said messuage or tenement against loss or damage by fire in the full value thereof to the satisfaction of the Trustees (*e*).

Power to invest.

5. Money subject to the trusts hereof may be invested in the purchase (including purchase as a residence for any person beneficially interested in possession hereunder) of or upon the security of such land or immovable property of any tenure wheresoever situate or of such personal or movable property (including stocks shares funds or securities) whatsoever and wheresoever or any interest therein respectively and whether involving liability or not (but excluding personal credit

(*d*) Estate duty will be payable on the whole property settled if the settlor dies within five years of the settlement. If he dies before the ultimate trust in his favour takes effect, payment of duty can be postponed until it is determined whether his contingent interest will become absolute, and if it does not no duty will be payable as his interest will be valueless. The settlement will not of course effect any saving of income tax or surtax.

(*e*) It does not appear possible to make any provision for insurance if the wife dies while the children are infants.

without security) as the Trustees in their absolute discretion think fit with power to vary such investments to the intent that the Trustees shall have the same full and unrestricted power of investing and varying investments in all respects (subject as aforesaid) as if they were absolutely and beneficially entitled to the trust money to be invested.

Power to make improvements on land, etc.

6. The Trustees may raise and apply trust money in (i) making improvements upon any land subject to the trusts hereof or in erecting repairing making structural alterations in or pulling down and rebuilding buildings or other erections thereon (ii) complying with the requirements of any order or direction under the Agriculture Act 1947 or the obligations imposed by or under any statute statutory instrument rule order or regulation (iii) payment of the costs of and incidental to obtaining permission for development of or payment of compensation in respect of any land subject to the trusts hereof pursuant to any Acts relating to planning control and all compensation (whether for depreciation of development value or otherwise) shall be capital.

Power to make arrangements, etc.

7. The Trustees shall have power (i) to make such arrangements upon the reconstruction of any company in which they hold stocks shares or securities as if they were the absolute owners of such stocks shares or securities (ii) to release part of any property subject to a security held on the trusts hereof if satisfied that the remaining security is sufficient to cover all moneys remaining due thereon and to vary the terms of any such security.

Power to settle questions.

8. The Trustees may (i) determine what moneys are to be considered as capital and what income (ii) determine what expenses costs outgoings or losses are properly payable out of capital or income (iii) exercise the powers of appropriation conferred by section forty-one of the Administration of Estates Act 1925 without any of the consents requisite for the execution of such powers by personal representatives (iv) determine all matters of doubt and questions arising in the execution of the trusts and powers hereof and every such determination (whether expressly or impliedly made) shall be conclusive and binding upon all persons then or thereafter to become interested hereunder.

[9. *Power for professional trustee to charge.*]

Power to appoint new trustees.

10. The power of appointing a new trustee or new trustees hereof shall be vested in the Settlor and the Wife during their joint lives and in the survivor during the residue of his or her life.

Covenant to pay duty on settlor's death within five years.

[11. The Settlor hereby covenants with the Trustees that he or his personal representatives will discharge any duty which may become payable in respect of the Trust Fund by reason of his death within five years of the date hereof immediately upon the same becoming payable.]

IN WITNESS, *etc.*

Form 15

Conveyance where Different Claimants to the Legal Estate and Power of Sale join in making Title (*a*)

Drafted by A. H. Withers, of Lincoln's Inn

THIS CONVEYANCE is made the —— day of —— 19— BETWEEN A of *etc.* (hereinafter called "the Vendor") of the first part B of *etc.* and C of *etc.* (hereinafter called "the Trustees") of the second part and D of *etc.* (hereinafter called "the Purchaser") of the third part. Parties.

WHEREAS it is apprehended that the property hereinafter described and expressed to be hereby conveyed is now vested in the Vendor alone for a legal estate in fee simple in possession free from incumbrances Recitals: title of vendor;

AND WHEREAS the said property (if vested in the Vendor alone) is settled land within the meaning of the Settled Land Act 1925 (hereinafter referred to as the said Act) and is comprised in one and the same settlement and the legal estate in such property has by an appropriate vesting instrument been duly [declared to be] vested in the Vendor in fee simple upon the trusts of the settlement affecting the said property and therein referred to and accordingly the Vendor has and can exercise over the said property the powers of a tenant for life under the said Act vesting instrument;

AND WHEREAS the Trustees are the trustees for the purposes of the said Act of the said settlement as is stated by such vesting instrument [an appropriate deed of declaration a memorandum whereof is endorsed on or annexed to such vesting instrument] trusteeship;

AND WHEREAS the said property (if not vested in the Vendor conveyance to trustees;

(*a*) The case contemplated by the recitals is where the Vendor has been tenant for life and has had a proper vesting deed made in his favour but has purported to convey the legal estate to the S. L. A. trustees on trust for sale, and the Purchaser contends that (on the facts disclosed to him) such conveyance was wrongly made and is void under S. L. A. 1925, s. 18 (1) (*a*).

The scheme of the precedent can be used in other cases where the persons receiving the purchase money can give a good receipt therefor, however title is made.

alone) is vested in the Trustees for a legal estate in fee simple in possession free from incumbrances and the Trustees hold the same upon trust to sell the same pursuant to the trust for sale thereof contained in a conveyance dated the —— day of —— and made between the Vendor of the one part and the Trustees of the other part

agreement for sale.

AND WHEREAS the Vendor and the Trustees in exercise of all powers and trusts enablng them or any of them in this behalf have joined in agreeing with the Purchaser for the absolute sale to the Purchaser at the price of £—— of the said property and the fee simple thereof in possession free from incumbrances.

Witnesseth.

NOW THIS CONVEYANCE WITNESSETH and it is hereby agreed and declared as follows:—

Receipt of purchase money.

1. This conveyance is made in pursuance of the said agreement for sale and in consideration of the sum of £—— on or before the execution of this conveyance paid by the Purchaser by the direction of the Vendor to the Trustees as such trustees as aforesaid the receipt whereof the Trustees hereby acknowledge and the payment whereof in manner aforesaid the Vendor hereby acknowledges.

Conveyance.

2. The Vendor as trustee by virtue of the powers (if any) vested in him by the said Act and of every or any other power enabling him in this behalf hereby conveys and the Trustees as trustees and in execution of all trusts (if any) enabling them in this behalf hereby convey and confirm unto the Purchaser ALL THAT *etc.*

TO HOLD the same UNTO the Purchaser in fee simple.

3. [*Acknowledgment for production of title deeds.*]

4. [*Stamp clause.*]

IN WITNESS *etc.*

Form 16

Conveyance by the Owner of a Two-storey House of the first floor only freehold, subject to a Rentcharge and partly in consideration for a Rentcharge (*a*).

This form was drafted by S. M. Tolson, of Lincoln's Inn

THIS CONVEYANCE is made the —— day of —— BETWEEN A of *etc.* of the one part and B of *etc.* of the other part. Parties.

WHEREAS:— Recitals.

(A) 1. The property described in the First Schedule hereto and delineated on the plan numbered I hereto is hereinafter called "the retained premises".

2. The property described in the Second Schedule hereto and delineated on the plan numbered II hereto is hereinafter called "the conveyed premises".

3. The said A is hereinafter called "the Vendor" and the said B is hereinafter called "the Purchaser".

(B) The Vendor is the estate owner in fee simple in possession free from encumbrances of the retained premises and the conveyed premises.

(C) The Vendor has agreed [(1) to create and sell to the Purchaser a perpetual yearly rentcharge of £2 to be charged upon the retained premises and to be further secured in the manner hereinafter appearing and (2)] for the sale to the Purchaser of the conveyed premises in consideration for [(1) a perpetual yearly rentcharge of £3 to be limited and secured on the conveyed premises in the manner hereinafter appearing and (2) in consideration of] the sum of £——.

NOW THIS DEED WITNESSETH:—

1. In pursuance of the said agreement and in consideration for [(1)] the sum of £—— paid by the Purchaser to the Vendor (the receipt whereof the Vendor hereby acknowledges) [(2) the yearly rentcharge of £3 hereinafter reserved and of the Purchaser's covenants hereinafter contained] the Vendor as beneficial owner hereby grants unto the Purchaser ALL THOSE Conveyance.

(*a*) See article at p. 350, *ante*. The user of a garden, if any, will depend on circumstances, *i.e.*, whether it is to be shared or part conveyed to the purchaser.

the conveyed premises TOGETHER WITH (i) one several equal half part in depth of the entire length of the floor marked party-floor on the said plan numbered II (ii) a full right of support to the conveyed premises (iii) full right and liberty for the Purchaser and his successors in title owners for the time being of the conveyed premises or any part thereof and all other persons authorised by him or them from time to time and at all times hereafter and for all purposes to use the staircase leading to the conveyed premises subject to the payment of a fair proportion of the expenses of maintaining and keeping such staircase in repair (iv) full right and liberty of ingress egress and regress for the purchaser and his successors in title owners for the time being of the conveyed premises or any part thereof and all other persons authorised by him or them from time to time and at all times hereafter and for all purposes to and from the said staircase with or without vehicles or animals over and along the driveway coloured —— on the plan numbered I hereto subject to the payment of a fair proportion of the expense of maintaining and keeping such driveway in repair (v) the right to the unimpeded access of light and air to all the windows marked on the plan numbered II (vi) the right to use any existing drains soakaways sewers pipes wires and cables now serving the conveyed premises which pass over or under the retained premises subject to the payment of a fair proportion of the expense of repairing renewing and reconstructing or enlarging the parts thereof whenever necessary TO HOLD the same unto the Purchaser in fee simple [Reserving thereout to the Vendor in fee simple a perpetual yearly rentcharge of £3 to be for ever charged upon and issuing out of the conveyed premises to commence from the date of this deed and to be paid by equal half yearly payments on the —— day of —— and the —— day of —— in every year free from all deductions whatsoever (property tax excepted) the first of such payments to be made on the —— day of —— next.]

Grant of rentcharge.

[2. In further pursuance of the said agreement and for the consideration aforesaid the Vendor as beneficial owner hereby grants unto the Purchaser ALL THAT perpetual yearly rentcharge

or annual sum of £2 to be for ever charged upon and issuing out of the retained premises to commence from the date of this deed and to be paid by equal half yearly payments on the —— day of —— and the —— day of —— in every year free from all deductions whatsoever (property tax excepted) the first of such payments to be made on the —— day of —— next.]

Purchaser's covenants.

2. [or 3.] The Purchaser hereby covenants with the Vendor for the benefit of the retained premises in the manner following (that is to say):—

[(i) that the Purchaser will at all times hereafter pay the said yearly rentcharge of £3 at the times hereinbefore appointed for the payment thereof]

(i) [or (ii)] that the Purchaser will at all times hereafter keep the conveyed premises and the party floor and drains belonging thereto in good and tenantable repair and condition

(ii) [or (iii)] that the Purchaser will permit the Vendor and all persons authorised by him once every year in the daytime on giving to the Purchaser or occupier for the time being of the conveyed premises at least one week's notice in writing of the intention so to do to enter into and upon the conveyed premises in order to examine the condition thereof.

Purchaser's restrictive covenants.

3. [or 4.] For the benefit of the retained premises the Purchaser (with the intent to bind all persons in whom the conveyed premises shall for the time being be vested but not so as to be personally liable for the breach of any restrictive covenant after he has parted with the conveyed premises) hereby further covenants with the Vendor in the manner following (that is to say):—

(i) that the Purchaser will not alter or permit to be altered the external plan or elevation of the conveyed premises without the previous consent in writing of the Vendor

(ii) that the Purchaser will not at any time without such consent as aforesaid carry on or permit to be carried on upon the conveyed premises any trade or business whatsoever or use the same or permit the same to be used for any purpose other than as a private dwelling-house

(iii) that the Purchaser will not do or suffer to be done any

act matter or thing whereby the retained premises may be rendered unfit for reasonable use as a private dwelling-house

Right of re-entry.

Provided always that if at any time during the lives of the descendants now living of his late Majesty King Edward VII and the life of the last survivor of them and twenty-one years after the death of such last survivor the owner or owners for the time being of the conveyed premises fail to truly observe perform fulfil or keep the stipulations contained in the covenants on his or their parts secondly and thirdly [or thirdly and fourthly] hereinbefore contained and shall continue in default for the space of —— months after a notice in writing to make good the same shall have been given or sent by post in a registered letter to him or them or left upon the conveyed premises by or on behalf of the owner or owners for the time being of the retained premises such notice to be given sent by post or left as aforesaid not later than —— months after the default specified therein and then and in such case it shall be lawful for the owner or owners for the time being of the retained premises at any time within —— months after the default made and continued as aforesaid and notwithstanding any actual or constructive waiver of any previous cause or right of re-entry to enter upon the conveyed premises or any part thereof in the name of the whole and henceforth to hold and enjoy the same in fee simple free from encumbrances and thereupon any conveyance for vesting in the owner or owners for the time being of the retained premises the legal estate in fee simple in the same shall forthwith be made and executed.

Vendor's covenants and restrictive covenants.

4. [or 5.] As 2. [or 3] Substitute throughout "Purchaser" for "Vendor" and vice versa

[in (i) substitute £2 for £3]

in (i) and (ii) [or (ii) and (iii)] Substitute "retained premises" for "conveyed premises" and vice versa.

5. [or 6.] As 3. [or 4.] Substitute "conveyed premises" for "retained premises" and vice versa and "Vendor" for "Purchaser" and vice versa and "fourthly and fifthly" [or "fifthly and sixthly"] for "secondly and thirdly" [or "thirdly and fourthly"].

[7. (i) Provided that if the conveyed premises shall fall into disrepair and the Purchaser shall fail to repair the same for the space of three months after a notice in writing requiring him so to do shall have been given to him left at or upon the conveyed premises by or on behalf of the Vendor then in such a case and so often as the same shall happen and notwithstanding the waiver of any previous default, the Vendor may at any time enter into and upon the conveyed premises and execute and do such works acts and things thereon as shall be necessary or proper for repairing the same and may remain in the possession or receipt of the rents and profits thereof until thereby or otherwise all sums of money expended by the Vendor or the persons deriving title under him in or about such works acts and things as aforesaid together with all costs and expenses occasioned by the exercise of this power be fully paid and satisfied Right of entry.

(ii) As 7. (i) Substitute "Vendor" for "Purchaser" and vice versa and "retained premises" for "conveyed premises"

(iii) The powers hereby reserved are respectively annexed to the rentcharges hereby reserved.]

6. [or 8.] The Vendor hereby acknowledges the right of the Purchaser to production of the documents mentioned in the First part of the Third Schedule hereto and to delivery of copies thereof And hereby undertakes for the safe custody thereof. Acknowledgments and undertakings.

7. [or 9.] As 6. [or 8.] Substitute "Vendor" for "Purchaser" and vice versa and "Second part of the Third Schedule" for "First part of the Third Schedule".

8. [or 10.] In these presents the expression "Vendor" and "Purchaser" include the persons respectively deriving title under them. Interpretation.

IN WITNESS, *etc.*

FIRST SCHEDULE

[(*Retained premises*) *Ground floor and surrounding land etc.*]

SECOND SCHEDULE

[(*Conveyed premises*) *First floor and roof.*]

THIRD SCHEDULE

PART I

[*Particulars of Documents retained by the Vendor.*]

PART II

[*Particulars of Documents retained by the Purchaser.*]

Form 17

Will of a testator, married and with infant children, leaving shares in a private company to Trustees on the Trusts of residue but with full powers necessary for the proper functioning of the company (*a*).

Drafted by Niul Hogg, Barrister-at-Law

I A B of —— declare this to be my last will which I make this —— day of —— 19—.

Revocation of previous wills.

1. I HEREBY revoke all other wills and testamentary dispositions by me heretofore made.

Appointment of executors and trustees.

2. I APPOINT (*b*) X of *etc.* Y of *etc.* and Z of *etc.* (hereinafter called "my Trustees") to be the executors and trustees of this my will and I declare that the expression "my Trustees" shall include the said X Y and Z and the survivors or survivor of them or other the Trustees or Trustee for the time being of this my will except where such construction is precluded by the context AND I DECLARE that my Trustees shall be the trustees of this my will for all the purposes of the Settled Land Act 1925.

Appointment of Settled Land Act trustees.

Legacy and bequest of chattels.

3. I GIVE and bequeath to my dear wife C B free of all duty (i) the sum of £—— and (ii) All my personal chattels as defined by the Administration of Estates Act 1925 section 55 (x).

(*a*) The circumstances envisaged are that the testator, who is married and has infant children, is the majority shareholder in a private company. He wishes to make provision for his widow and for his children and he also wishes to provide for the continuance of his company and for the participation therein of his children when they are of age.

(*b*) In view of the special powers to be given to the trustees in regard to the company the selection of the trustees will require some care. Since the widow's income will depend in a peculiar degree on the exercise of the trustee's discretion it might be advisable that she should herself be appointed a trustee.

4. I GIVE and devise free of all duty my dwelling-house known as —— and situate at —— in the county of —— together with the land held therewith unto my said wife for her life and after her death the same shall fall into and become part of my residuary estate and be held upon the trusts to be declared of and concerning my Residuary Trust Fund.

Devise of dwelling-house to wife for life.

5. (1) I GIVE and bequeath unto my Trustees all my shares in —— Ltd. (hereinafter called "my company") to hold the same upon the trusts to be declared of and concerning my Residuary Trust Fund and it is my wish that my Trustees shall continue and promote the business of my company for the benefit of my estate so long as they consider it remunerative so to do

Bequest of shares in private company to trustees upon the trusts of residue.

(2) In relation to the said shares and any other shares which may become vested in my Trustees by virtue of this clause or clause 11 (2) hereof (all of which shares together are hereinafter called my "Business Trust Fund") and in relation to my company (which phrase shall in this sub-clause where the context admits include any company whose shares form part of my Business Trust Fund) my Trustees in addition to any powers which they may have by law shall have the following powers that is to say (*c*):—

Powers of trustees in relation to such shares.

(i) To promote or agree to any reconstruction amalgamation or other arrangement or scheme concerning my company

(i) Reconstruction, sale, etc.

(ii) To accept in addition to or in lieu of those already held other shares in my or some other company in connection with or as part of such reconstruction amalgamation or other arrangement or scheme (*d*)

(ii) To accept shares

(*c*) Since the testator is a majority shareholder in the company, the effect of this clause will be to make his trustees majority shareholders; and unless they have very full powers the proper functioning of the company may become impossible.

(*d*) It is hoped that paragraphs (i) and (ii) will obviate the difficulty met in *Re Walker's Settlement*, [1935] Ch. 567, where the Court of Appeal held that the transfer of trustee shares to a holding company in return for shares in the holding company was not a reconstruction, amalgamation or sale within s. 10 (3) of the Trustee Act, 1925. It will be noted that the fasciculus of sections in the Companies Act, 1948, dealing with these matters is cross headed "Arrangements and Reconstructions" and that s. 209 which gives power to enforce such a transaction as was carried out in *Re Walker's Settlement* describes the transaction as "a scheme or contract".

(iii) Bonus shares.

(iii) To accept bonus shares issued to them and to treat the same as capital or as income according as in their complete discretion they think fit (*e*)

(iv) Winding up.

(iv) To propose or agree to the winding up of my company and to invest any moneys arising therefrom as though the same were proceeds of sale arising under paragraph (vi) hereof

(v) Qualification of directors.

(v) To transfer at any time or times to a nominee for my Trustees with a view to qualifying such nominee to act as a director of my company such a number of shares in my company as may be necessary to qualify such nominee to act as a director (*f*) And on such a nominee ceasing to act as a director of my company the shares so transferred to him shall be forthwith retransferred to my Trustees.

Declaration that trustees may retain director's fees.

AND I DECLARE that a trustee of my will may be such a nominee and that any trustees of my will or other nominee who shall act as a director of my company may be paid and retain any fees paid to him by my company as such director (*g*)

(vi) To sell shares.

(vi) To sell at any time or times all or any of the shares forming part of my Business Trust Fund and invest the proceeds of sale in a manner authorised by clause 11 hereof. And if such investments are made under sub-clause (1) of the said clause 11 my Trustees shall hold such investments as though they formed part of my Residuary Trust Fund.

Provision for participation of adult children in running the company.

(3) It is my hope that my children when they are of age will take an interest and an active part in running the affairs of my company and accordingly subject to the consent of my said wife and at the request of any child of mine who shall have

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(*e*) This power is thought desirable in order to prevent any conflict of duty in the trustees in their dual position as majority shareholders and as trustees. Its object is to allow the trustees to consent to the distribution of profits as bonus shares without thereby prejudicing the tenant for life. Without this power the trustees' duty to act fairly between the beneficiaries might compel them to refuse their consent to an issue of bonus shares.

(*f*) It is thought desirable to make so wide a provision as this since the trustees are majority shareholders holding perhaps as much as 99 per cent. of the shares, but yet may not themselves wish to act as directors.

(*g*) It is obviously desirable that directors in such a case as this should keep their fees otherwise it might be that no one would become a director. In view of the decision in *Re Gee*, [1948] Ch. 284, it is necessary to make clear and express provision for this.

attained the age of twenty-one years my Trustees shall have power to pay and transfer the whole or such portion as they shall think fit of the vested share of such child in my Business Trust Fund both as to the legal and beneficial interest therein to such child (*h*)

AND I DECLARE that for the purposes of this sub-clause the words "children and child" shall include any remoter issue of mine who may have attained a vested interest under the proviso to clause 10 hereof

Provision for alterations in the company during the testator's lifetime.

(4) (i) If during my lifetime my company be reconstructed or the business of my company be sold to any other company or be amalgamated with the business of any other company or if my company becomes a subsidiary of any holding company any shares held by me at my death in any other company by reason of such reconstruction sale or amalgamation as aforesaid or in any such holding company shall be held by my Trustees upon the trusts and subject to the powers and provisions of this clause (*i*)

(ii) In this clause shares of a company include all shares stocks funds debentures debenture-stock mortgages and other securities of the company.

Devise and bequest of residue to trustees.

6. I DEVISE and bequeath all the real and personal property whatsoever and wheresoever of or to which I shall be possessed or entitled at my death or over which I shall have general power of appointment or disposition by Will except property otherwise disposed of by this my Will or any codicil hereto Unto my Trustees Upon the trusts and with and subject to the powers and provisions hereinafter declared of and concerning the same that is to say:—

On trust for sale and conversion.

7. Upon Trust that my Trustees shall sell call in collect and convert into money the said real and personal property at such

(*h*) This sub-clause is more or less self explanatory. Its purpose is to make provision for the testator's children (and it may be grandchildren) to take an active part in the running of the company during the life of their mother and before their shares would normally have become vested in possession.

(*i*) This sub-clause allows for any metamorphosis in the shares or business of the testator's company during his lifetime and is required to avoid the need continually to bring the will up to date.

time or times and in such manner as they shall think fit (but as to reversionary property not until it falls into possession unless it shall appear to my trustees that an earlier sale would be beneficial) with power to postpone the sale calling in and conversion of the whole or any part or parts of the said property including leaseholds or other property of a terminable hazardous or wasting nature during such period as they shall think proper and to retain the same or any part thereof in its actual form of investment without being responsible for loss and I direct that the income of such of the same premises as for the time being shall remain unsold shall as well during the first year after my death as afterwards be applied as if the same were income arising from investments hereinafter directed to be made of the proceeds of sale thereof and that no reversionary or other property not actually producing income shall be treated as producing income for the purposes of this my Will.

Trust for payment of debts, etc.

8. MY TRUSTEES shall out of the moneys to arise from the sale calling in and conversion of or forming part of my said real and personal property pay my funeral and testamentary expenses (including all estate duty leviable at my death in respect of my residuary estate) and debts and the legacies given by this my Will or any codicil hereto and all death duties and other moneys which under or by virtue of any direction or bequest free of duty contained in this my Will or any codicil hereto are payable out of my general personal estate and make provision for the payment of any annuities by any codicil hereto bequeathed by me And in relation to such payments and provisions the rule of equity called the rule in *Alhusen* v. *Whittell* shall be disregarded.

Trust for investment of proceeds.

9. My Trustees shall at their discretion invest the residue of the said moneys in or upon any of the investments hereby authorised with power to vary or transpose such investments for others of a nature hereby authorised.

Trusts of residue.

10. My Trustees shall stand possessed of the residue of the said moneys and the investments for the time being representing the same and of such part of my estate as shall for the time being remain unsold and unconverted (all of which premises are

hereinafter referred to as my Residuary Trust Fund) upon trust to pay the income thereof to my said wife during her lifetime and after the death of my said wife upon trust for such of my children as attain the age of twenty-one years or marry under that age if more than one as tenants in common in equal shares.

Life interest to wife.

Remainder to children equally at 21 or marriage.

PROVIDED ALWAYS that if any child of mine shall have died in my lifetime (whether before or after the date of this my will) leaving issue living at my death such issue attaining the age of twenty-one years or marrying under that age shall take by substitution if more than one as tenants in common in equal shares the share in my Residuary Trust Fund which such deceased child of mine would have taken under the trusts in that behalf hereinbefore declared had he or she survived me and attained a vested interest but so that no issue remoter than a child of such deceased child of mine shall take except in the case of the death of his her or their parent before me and in place of such parent.

Proviso for substitution of remoter issue in case of predecease of child.

11. (1) Trust Moneys may be invested in the purchase of or upon the security of such freehold or leasehold property stocks shares funds or securities of whatsoever nature and wheresoever and whether involving liability or not or upon such personal credit with or without security as my Trustees in their absolute discretion think fit with power to vary such investments to the intent that my Trustees shall have the same full and unrestricted power of investing and varying investments in all respects as if they were absolutely entitled thereto beneficially and I hereby expressly declare that it shall be lawful for my Trustees to purchase out of the share of any beneficiary any freehold or leasehold property (such leasehold property having a term of not less than fifteen years unexpired) as a residence for such beneficiary notwithstanding that such beneficiary has only a life or lesser interest in such share

Powers of investment etc.

(2) Without prejudice to the generality of the previous subclause trust moneys may also be invested in or upon the shares stocks funds debentures debenture-stock mortgages or other securities of —— Ltd. or of any subsidiary or holding company thereof or of any company formed to take over the assets of

—— Ltd. or with which that company has been amalgamated and any investments so made shall be held as part of my Business Trust Fund and upon the trusts and subject to the powers and provisions set out in clause 5 hereof (*j*).

Power of appropriation.

12. My Trustees as well in their capacity of personal representatives and as trustees may in extension of the powers of appropriation conferred upon personal representatives by section 41 of the Administration of Estates Act 1925 at any time or times at their sole discretion and without any of the consents made necessary by the said Act appropriate any part of my residuary estate in its then actual condition or state of investment in or towards satisfaction of any legacy or any share in my residuary estate whether or not the same be settled.

Power to determine questions.

13. My Trustees may conclusively determine what articles pass under any specific bequests contained in this my Will or any codicil hereto and subject to the provisions hereinbefore contained whether any moneys are to be considered as capital or income and whether any expenses repairs outgoings or other payment ought to be paid out of capital or income and may apportion blended trust funds and determine all questions and matters of doubt arising in the execution of the trusts of this my will or any codicil hereto And any such determination whether made upon a question actually raised or implied in the acts or proceedings of my Trustees shall be conclusive and bind all persons claiming hereunder.

Power of solicitor trustee to charge.

14. Any executor or trustee for the time being hereof being a Solicitor or other person engaged in any profession or business shall be entitled to charge and be paid all usual professional or other charges for business done by him or his firm in relation to the trusts hereof and also his reasonable charges in addition to disbursements for all other work or business done and all time spent by him or his firm in connection with matters arising in the premises including matters which might or should have been attended to in person by a trustee not being a solicitor or other

(*j*) This sub-clause enables the trustees to put new capital into the company if this should prove desirable and ensures that the trustees have the same wide powers in relation to such new investments as they have to the shares bequeathed by clause 5.

professional person but which such trustee might reasonably require to be done by a solicitor or other professional person.

AS WITNESS, *etc.*

Form 18

Covenant by a Lessee not to assign without first offering to surrender the demised Premises to the Landlord (*a*).

THE LESSEE HEREBY covenants with the Lessor in manner following that is to say:—

THAT the Lessee will not assign underlet or part with possession of the said premises or any part thereof for all or any part of the said term without first giving previous notice in writing to the Lessor and offering to assign or surrender to the Lessor the said premises or such part thereof as the Lessee may desire to assign or sublet and in the event of the Lessor giving notice in writing to the Lessee within four weeks of the service of any such notice by the Lessee of his desire to take an assignment of or surrender of the said premises or such part thereof as aforesaid the Lessee will forthwith assign or surrender the said premises or such part thereof as aforesaid

(*a*) In the case of dwelling-houses within the scope of the Rent Restrictions Acts restrictions on assignment are of importance, for if such a restriction is properly framed the landlord will be able to prevent a tenant, who no longer wants the premises for his own occupation, assigning them to a nominee of his own who at the determination of the term will be entitled to the protection of the Acts. The best method of doing this was, and indeed still is, to insert in the lease an absolute covenant against assignment which is not within the ambit of the Landlord and Tenant Act, 1927. It would not seem, however, that such a covenant will long afford absolute protection to a landlord because the Leasehold Committee's Final Report (Cmd. 7982) contains a recommendation that absolute covenants against assignment or subletting should be construed as if they were covenants against assignment or subletting without licence or consent and so be subject to the proviso that such consent is not to be unreasonably withheld. Accordingly, the best method of protecting the lessor appears to be to insert in the lease a covenant that the lessee wishing to assign or sublet will offer to assign or surrender the premises to the lessor. Such a covenant should put the lessor in a position to prevent the lessee introducing into the premises an assignee or subtenant who will obtain the protection of the Acts, if the lessor himself wants to regain control of the premises for his own occupation or to relet to a tenant of his choice.

to the Lessor or as he may direct PROVIDED ALWAYS that nothing herein contained shall prevent the Lessee from subletting the premises or any part thereof furnished for any term not exceeding one year.

THAT (*b*) in the event of the Lessor failing to exercise the aforesaid option to take an assignment or surrender of the said premises or any part thereof the Lessee will not assign transfer underlet or part with the possession of the said premises or any part thereof or part with or share the possession or occupation thereof or of any part thereof (otherwise than by will or by underletting the same furnished for any term not exceeding one year) without the previous consent in writing of the Lessor but so that such consent shall not be unreasonably, arbitrarily, or vexatiously withheld.

(*b*) Care must be taken in framing this clause to follow the orthodox form for the Court of Appeal held in *Moat* v. *Martin*, [1949] 1 K. B. 175, that where the covenant contained a proviso that the landlord's consent would not "be withheld in the case of a respectable and responsible tenant" no consent by the landlord was required where the assignment was in fact to a respectable and responsible tenant. Where the correct form of covenant is used it has been held that it is not unreasonable for a landlord to withhold his consent to an assignment shortly before the end of the term which would have the effect of enabling the assignee to become a statutory tenant: *Lee* v. *K. Carter, Ltd.*, [1949] 1 K. B. 85; *Swanson* v. *Forton*, [1949] Ch. 143; *Dollar* v. *Winston*, [1950] Ch. 236.

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THE CONVEYANCER

AND

PROPERTY LAWYER

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